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- Assigned to:
- Division of Facilities Construction & Management
- Division of Purchasing and General Services
- Capitol Preservation Board
- Prison Relocation and Development Authority, Building Board, etc.

# Scope of Presentation

This presentation will include some of the important new provisions of SB 190, 2013 Utah Legislatures, as well as ethics and criminal laws affecting employees and procurement. At times, excerpts of statutes are provided. Some statutes and rules are not stated herein and therefore this presentation is not to be substituted for reading all of the applicable statutes and rules.

# Many laws apply

- This “ethics” portion of this presentation will includes provisions from the:
- 1. Bribery statutes
- 2. Utah Ethics Act
- 3. Utah Antitrust Act
- 3. Procurement Code, Part 23
- **Result – don’t take anything of value, avoid even the appearance of impropriety**

# Best Practices – NASPO – take nothing!

## ➤ Take Nothing, Ever

- **NASPO:** *A truly independent procurement professional should not accept even cookies from the vendor dropping by. Why not? It is often said, “Surely no one is bought for a couple of cookies!” but if procurement professionals make it their policy to take nothing from any vendor, not even the cookies, no person can ever point to the “appearance” of a ‘relationship.’*
- **National Association of State Procurement Officials**
- **State & Local Government Procurement – A Practical Guide, p. 29**
- (from Purchasing Website)



# NASPO Best Practices, Cont'd.

- Take Nothing, Ever
- **NASPO:** *“He or she who refuses to take the cookies also creates no eye witness who can testify against the agency in the event of a dispute. Even where government ethical rules permit a public employee to accept lunch or anything valued under **[\$10 Utah]**, the procurement professional should take nothing. This policy guarantees that there will be neither the appearance, nor the fact, of conflicts of interest.”*
- **National Association of State Procurement Officials**
- **State & Local Government Procurement – A Practical Guide, p. 29** (from Purchasing Website)

# Federal Antitrust Laws

## Prohibit Anticompetitive Practices

Congress passed the Sherman Antitrust Act in 1890 to combat anticompetitive practices and preserve unfettered competition as the rule of trade. (See Sherman Act for complete listing of anticompetitive practices)

**Illegal Per Se:** Some practices are deemed by the courts to be so obviously anticompetitive that they are categorized as being automatically unlawful, or illegal per se.

- Price Fixing,
- Bid Rigging,
- Market Sharing, and
- Group Boycott

Note: The State of Utah has also adopted Antitrust Laws that have criminal and civil penalties.

(note: from Purchasing Website)

# General Antitrust Statute

- **76-10-3104. Illegal anticompetitive activities.**



(1) Every contract, combination in the form of trust or otherwise, **or conspiracy in restraint of trade or commerce is declared to be illegal.**



(2) It shall be unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce.



# Treble Damages

- **76-10-3109. Person may bring action for injunctive relief and damages -- Treble damages -- Recovery of actual damages or civil penalty by state or political subdivisions -- Immunity of political subdivisions from damages, costs, or attorney fees.**



(1) (a) A person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, **regardless of whether the person dealt directly or indirectly with the defendant.** This remedy is in addition to any other remedies provided by law. It may not diminish or offset any other remedy.



**(b) Subject to the provisions of Subsections (3), (4), and (5), the court shall award three times the amount of damages sustained, plus the cost of suit and a reasonable attorney fees, in addition to granting any appropriate temporary, preliminary, or permanent injunctive relief. . . .**

Renumbered and Amended by Chapter 187, 2013 General Session

- Amended by Chapter 278, 2013 General Session

# Fines and Prison

- **76-10-3112. Fine for violation -- Certain vertical agreements excluded -- Nolo contendere.**
- (1) (a) Any person who violates Section 76-10-3104 by price fixing, bid rigging, agreeing among competitors to divide customers or territories, or by engaging in a group boycott with **specific intent of eliminating competition is guilty of a third degree felony and**, notwithstanding Sections 76-3-301 and 76-3-302, is subject to:
  - (i) **if an individual, a fine not to exceed \$100,000; or**
  - (ii) **if by a person other than an individual, a fine not to exceed \$500,000.**
- (b) Subsection (1)(a) may not be construed to include vertical agreements between a manufacturer, its distributors, or their subdistributors dividing customers and territories solely involving the manufacturer's commodity or service where the manufacturer distributes its commodity or service both directly and through distributors or subdistributors in competition with itself.
- (2) A defendant may plead nolo contendere to a charge brought under this title but only with the consent of the court. The court may accept the plea only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.
- Renumbered and Amended by Chapter 187, 2013 General Session
- Amended by Chapter 285, 2013 General Session

# Bribery Statutes

## ➤ 76-8-103 Bribery or offering a bribe.

- (1) A person is guilty of bribery or offering a bribe if that person promises, offers, or agrees to give or gives, directly or indirectly, any benefit to another **with the purpose or intent to influence an action, decision, opinion, recommendation, judgment, vote, nomination, or exercise of discretion of a public servant, party official, or voter.**
- (2) It is not a defense to a prosecution under this statute that:
  - (a) the person sought to be influenced was not qualified to act in the desired way, whether because the person had not assumed office, lacked jurisdiction, or for any other reason;
  - (b) the person sought to be influenced did not act in the desired way; or
  - (c) the benefit is not conferred, solicited, or accepted until after:
    - (i) the action, decision, opinion, recommendation, judgment, vote, nomination, or exercise of discretion, has occurred; or
    - (ii) the public servant ceases to be a public servant.
- **(3) Bribery or offering a bribe is:**
  - **(a) a third degree felony when the value of the benefit asked for, solicited, accepted, or conferred is less than \$1,000; and**
  - **(b) a second degree felony when the value of the benefit asked for, solicited, accepted, or conferred is \$1,000 or more.**
- Amended by Chapter 92, 1998 General Session



# More Bribery Statutes!

- **76-8-105 Receiving or soliciting bribe or bribery by public servant.**
- (1) **A person** is guilty of receiving or soliciting a bribe if that person asks for, solicits, accepts, or receives, directly or indirectly, any benefit with the understanding or agreement that the purpose or intent is to influence an action, decision, opinion, recommendation, judgment, vote, nomination, or exercise of discretion, of a public servant, party official, or voter.
- (2) It is not a defense to a prosecution under this statute that:
  - (a) the person sought to be influenced was not qualified to act in the desired way, whether because the person had not assumed office, lacked jurisdiction, or for any other reason;
  - (b) the person sought to be influenced did not act in the desired way; or
  - (c) the benefit is not asked for, conferred, solicited, or accepted until after:
    - (i) the action, decision, opinion, recommendation, judgment, vote, nomination, or exercise of discretion, has occurred; or
    - (ii) the public servant ceases to be a public servant.
- (3) **Receiving or soliciting a bribe is:**
  - (a) **a third degree felony when the value of the benefit asked for, solicited, accepted, or conferred is \$1,000 or less; and**
  - (b) **a second degree felony when the value of the benefit asked for, solicited, accepted, or conferred exceeds \$1,000.**
- Repealed and Re-enacted by Chapter 92, 1998 General Session

# Official Misconduct

- **76-8-201 Official misconduct -- Unauthorized acts or failure of duty.**
- A public servant is guilty of a class B misdemeanor if, with an intent to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office, or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.
- Enacted by Chapter 196, 1973 General Session
- **76-8-101 Definitions.**
- For the purposes of this chapter: . . .
- (5) (a) "Public servant" means any officer or employee of the state or any political subdivision of the state, including judges, legislators, consultants, and persons otherwise performing a governmental function.
- (b) A person is considered a public servant upon his election, appointment, or other designation as such, although he may not yet officially occupy that position.

# Inside Information

- **76-8-202 Official misconduct -- Unlawful acts based on "inside" information.**
- A public servant is guilty of a class A misdemeanor if, knowing that official action is contemplated or in reliance on information which he has acquired by virtue of his office or from another public servant, which information has not been made public, he:
  - (1) acquires or divests himself of a pecuniary interest in any property, transaction, or enterprise which may be affected by such action or information;
  - (2) speculates or wagers on the basis of such action or information; or
  - (3) knowingly aids another to do any of the foregoing.

# Interference with Public Servant

- **76-8-301 Interference with public servant.**
- (1) A person is guilty of interference with a public servant if he:
  - (a) **uses force, violence, intimidation, or engages in any other unlawful act with a purpose to interfere with a public servant performing or purporting to perform an official function; or**
  - (b) knowingly or intentionally interferes with the lawful service of process by a public servant.
- (2) **Interference with a public servant is a class B misdemeanor.**
- (3) For purposes of this section, "public servant" does not include jurors.



# Misusing Public money

- **76-8-402 Misusing public money.**
- (1) Every public officer of this state or a political subdivision, or of any county, city, town, precinct, or district of this state, **and every other person charged, either by law or under contract, with the receipt, safekeeping, transfer, disbursement, or use of public money** commits an offense if the officer or other charged person:
  - (a) **appropriates the money** or any portion of it to his own use or benefit or to the use or benefit of another **without authority of law; . . .**
- (2) A violation of Subsection (1) **is a felony of the third degree**, except it is a felony of the second degree if:
  - (a) the value of the money exceeds \$5,000;
  - (b) the amount of the false account exceeds \$5,000;
  - (c) the amount falsely entered exceeds \$5,000;
  - (d) the amount that is the difference between the original amount and the fraudulently altered amount exceeds \$5,000; or
  - (e) the amount falsely erased, fraudulently concealed, destroyed, obliterated, or falsified in the account exceeds \$5,000.
- (3) In addition to the penalty described in Subsection (2), a public officer who violates Subsection (1) is subject to the penalties described in Section 76-8-404.
- Amended by Chapter 106, 1999 General Session

# Utah Public Officers' and Employees' Ethics Act

- **67-16-5 Accepting gift, compensation, or loan -- When prohibited.**
- (1) As used in this section, "economic benefit tantamount to a gift" includes:
- (a) a loan at an interest rate that is substantially lower than the commercial rate then currently prevalent for similar loans; and
- (b) compensation received for private services rendered at a rate substantially exceeding the fair market value of the services.
- (2) Except as provided in Subsection (4), it is an offense for a public officer or public employee to knowingly receive, accept, take, seek, or solicit, directly or indirectly for himself or another a gift of substantial value or a substantial economic benefit tantamount to a gift:
- (a) that would tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties;
- (b) that the public officer or public employee knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the public officer or public employee for official action taken; or
- (c) if the public officer or public employee recently has been, is now, or in the near future may be involved in any governmental action directly affecting the donor or lender, unless a disclosure of the gift, compensation, or loan and other relevant information has been made in the manner provided in Section 67-16-6.

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# Ethics Act (cont'd.)

- (3) Subsection (2) does not apply to:
  - **(a) an occasional nonpecuniary gift, having a value of not in excess of \$50;**
  - (NOTE- What is occasional? Also must be nonpecuniary – no cash)
  - (b) an **award publicly presented** in recognition of public services;
  - (c) any bona fide loan made in the ordinary course of business;
  - or
  - (d) a political campaign contribution.
- (4) This section does not apply to a public officer or public employee who engages in conduct that constitutes a violation of this section to the extent that the public officer or public employee is chargeable, for the same conduct, under Section 63G-6a-2304.5 or Section 76-8-105.
- Amended by Chapter 445, 2013 General Session

# Ethics Act – Donations

- **67-16-5.3. Requiring donation, payment, or service to government agency in exchange for approval -- When prohibited.**
- (1) Except as provided in Subsection (3), **it is an offense for a public officer, public employee, or legislator to demand from any person as a condition of granting any application or request for a permit, approval, or other authorization, that the person donate personal property, money, or services to any agency.**
- (2) (a) Subsection (1) does not apply to any donation of property, funds, or services to an agency that is:
  - (i) expressly required by statute, ordinance, or agency rule;
  - (ii) mutually agreed to between the applicant and the entity issuing the permit, approval, or other authorization;
  - (iii) made voluntarily by the applicant; or
  - (iv) a condition of a consent decree, settlement agreement, or other binding instrument entered into to resolve, in whole or in part, an actual or threatened agency enforcement action.
- (b) If a person donates property, funds, or services to an agency, the agency shall, as part of the permit or other written authorization:
  - (i) identify that a donation has been made;
  - (ii) describe the donation;
  - (iii) certify, in writing, that the donation was voluntary; and
  - (iv) place that information in its files.
- (3) This section does not apply to a public officer, public employee, or legislator who engages in conduct that constitutes a violation of this section to the extent that the public officer, public employee, or legislator is chargeable, for the same conduct, under Section 63G-6a-2304.5 or Section 76-8-105.
- Amended by Chapter 445, 2013 General Session

# Ethics Act- Disclose Interest

- **67-16-7 Disclosure of substantial interest in regulated business.**
- (1) Every public officer or public employee who is an officer, director, agent, employee, or the owner of a substantial interest in any business entity which is subject to the regulation of the agency by which the officer or employee is employed, shall disclose any such position held and the precise nature and value of the public officer's or public employee's interest upon first becoming a public officer or public employee, and again whenever the public officer's or public employee's position in the business entity changes significantly or if the value of his interest in the entity is significantly increased.
- (2) The disclosure required under Subsection (1) shall be made in a sworn statement filed with:
  - (a) the state attorney general in the case of public officers and public employees of the state;
  - (b) the chief governing body of the political subdivision in the case of public officers and public employees of a political subdivision;
  - (c) the head of the agency with which the public officer or public employee is affiliated; and
  - (d) in the case of a public employee, with the immediate supervisor of the public employee.
- (3) This section does not apply to instances where the total value of the interest does not exceed \$2,000. Life insurance policies and annuities shall not be considered in determining the value of any such interest.
- (4) Disclosures made under this section are public information and shall be available for examination by the public.
- Amended by Chapter 147, 1989 General Session

# Ethics Act Transaction Prohibitions

- **67-16-8 Participation in transaction involving business as to which public officer or employee has interest -- Exceptions.**
- (1) No public officer or public employee shall participate in his official capacity or receive compensation in respect to any transaction between the state or any of its agencies and any business entity as to which such public officer or public employee is also an officer, director, or employee or owns a substantial interest, unless disclosure has been made as provided under Section 67-16-7.
- (2) A concession contract between an agency, political subdivision, or the state and a **certified professional golf association member** who is a public employee or officer does not violate the provisions of Subsection (1) or Title 10, Chapter 3, Part 13.



# Ethics Act – Misc.

- **67-16-9 Conflict of interests prohibited.**
- No public officer or public employee shall have personal investments in any business entity which will create a substantial conflict between his private interests and his public duties.
  
- **67-16-10. Inducing others to violate chapter.**
- No person shall induce or seek to induce any public officer or public employee to violate any of the provisions of this chapter.
  
- **67-16-11. Applicability of provisions.**
- The provisions of this chapter apply to all public officers and public employees.

# Ethics Act - Penalties

- **67-16-12 Penalties for violation -- Removal from office or dismissal from employment.**
- In addition to any penalty contained in any other provision of law:
- (1) any public officer or public employee who knowingly and intentionally violates this chapter, with the exception of Sections 67-16-6 and 67-16-7, shall be dismissed from employment or removed from office as provided by law, rule, or policy within the agency; and
- (2) any public officer, public employee, or person who knowingly and intentionally violates this chapter, with the exception of Sections 67-16-6 and 67-16-7, shall be punished as follows:
- (a) as a felony of the second degree if the total value of the compensation, conflict of interest, or assistance exceeds \$1,000;
- (b) as a felony of the third degree if:
  - (i) the total value of the compensation, conflict of interest, or assistance is more than \$250 but not more than \$1,000; or
  - (ii) the public officer or public employee has been twice before convicted of violation of this chapter and the value of the conflict of interest, compensation, or assistance was \$250 or less;
- (c) as a class A misdemeanor if the value of the compensation or assistance was more than \$100 but does not exceed \$250; or
- (d) as a class B misdemeanor if the value of the compensation or assistance was \$100 or less.
- Amended by Chapter 108, 2000 General Session
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# Ethics Act – Dismissal – Contract may be Void

- **67-16-14. Unethical transactions -- Duty to dismiss officer or employee -- Right to rescind or void contract.**
- If any transaction is entered into in violation of Section 67-16-6, 67-16-7, or 67-16-8, the state, political subdivision, or agency involved:
- (1) **shall dismiss the public officer or public employee** who knowingly and intentionally violates this chapter from employment or office as provided by law; and
- (2) **may rescind or void any contract** or subcontract entered into in respect to such transaction without returning any part of the consideration that the state, political subdivision, or agency has received.
- Amended by Chapter 147, 1989 General Session

# Old Code – Felony to Accept

- **63G-6-1001 (Repealed 05/01/13). Felony to accept emolument.**
- Any person acting as a procurement officer for the state of Utah or any subdivision thereof, or who in any official capacity participates in the procurement of any supplies, services, construction, real property, or insurance for any such political units, is **guilty of a felony** if the person asks, receives, or offers to receive any emolument, **gratuity**, contribution, loan, or reward, or any promise thereof, either **for the person's own use or the use or benefit of any other person or organization** from any person interested in the sale of such supplies, services, construction, real property, or insurance.

# Old Code – Felony to Offer

- **63G-6-1002 (Repealed 05/01/13). Felony to offer emolument.**
- **A person who is interested** in any way in the sale of any supplies, services, construction, real property, or insurance to the state of Utah or any political subdivision thereof, is **guilty of a felony** if the person **gives or offers** to give any emolument, **gratuity**, contribution, loan or reward, or any promise thereof to any person acting as a procurement officer, or who in any official capacity participates in the procurement of such supplies, services, construction, real property, or insurance, **whether it is given for the person's own use or for the use or benefit of any other person or organization.**
- **(note – no dollar value limit. Also to the benefit the organization!)**

# How some interpreted old law

- Felony for public officer or public employee to accept anything of value while acting as a procurement officer or participating in a procurement .
- - Bottled of water, Pen, Coffee Cup, Paperclip, etc. ?
- - Doughnut at a Training Seminar?
- - Sky Miles, Ticket to a Game, Meal, etc.?
- - Product Samples ?
- - Sponsorship of an Event Organized by a Public Entity?
- - Gifts to a Person or an Organization ?
- (note – from Purchasing Website)

## SB 190 (2013) changed gratuity prohibitions

- SB 190, 2013 Utah Legislature, contains the current gratuity prohibitions. Those prohibition are in Part 23 of the Utah Procurement Code. However, Special Districts and others were exempt from this part. (Section **63G-6a-2308.**) **The AG's office led a group of public entities**, State, Counties, Cities, School Districts, Higher Ed, Public Ed, Special Districts, etc. to propose **a revised Part 23 which will apply to all public entities in the State.** What follows is what was sent to LRGC for proposed legislation. I will focus on this new proposal for purposes of this CLE. However, the current law is in the materials on the website and I will mention it briefly.

# Proposed Part 23

- **Part 23. Unlawful Conduct and Penalties**

- **63G-6a-2301. Title.**

This Part, Sections 63G-6a-2301 through 63G-61 2312, is known as "Unlawful Conduct and Penalties."\_



- **63G-61-2302. Applicability.**

- Except as provided in (2) below, this Part, Sections 63G-6a-2301 through 63G-61 2312, shall apply to all public entities. (Currently, this applies to the State – but not all public entities)



# Definitions

- **63G-6a-2303. Definitions.** As used in this Part, Sections 63G-6a-2301 through 63G-6a-2312:
- (1) “**Active period of a procurement**” means the period that commences when a person is involved in the decision making process pertaining to the activities below and ends when a person is no longer involved in the decision making process pertaining to the activities below:
  - (a) **Deciding to purchase** a procurement item,
  - (b) **Making recommendations** regarding the award of a contract or grant including the evaluation of a quote, a bid, or a proposal;
- (note – “active period” is only relevant for participants, not procurement professionals)

# Definitions (Cont'd.)

- (c) **Enforcing** contract or grant compliance;
- (d) **Approving** contract or grant payments;
- (e) Approving contract or grant **change orders** or amendments, including adding **additional monies** to a contract or grant;
- (f) **Acting as a member of an evaluation committee**; or
- (g) **Involvement in drafting** a **solicitation** document, conducting a solicitation or drafting **specifications**.  
Solicitation includes requests for information, request for proposals, invitation for bids, request for statements of qualifications, sole source and small purchases.



# Definitions - Contribution

- (2) "Contribution" means:
  - (a) a voluntary gift or donation to a public entity for a public entity's use, and not for a particular specified person employed by a public entity, including:
    - (i) a philanthropic donation;
    - (ii) services;
    - (iii) money; or
    - (iv) other items of value;
    - (v) admission to a seminar, vendor fair, charitable event, fundraising event, or similar event that relates to the function of a public entity;
    - (vi) purchase of a booth at an event sponsored by a public entity or a group of which a public entity is a member; or
    - (vii) sponsorship of an event that is organized by a public entity.

# Definition: Gratuity

- (3) (a) "Gratuity" means anything of value given to a public entity recipient that is in excess of any market value provided by the public entity recipient including:
  - (i) a gift or favor;
  - (ii) money;
  - (iii) a loan at an interest rate below the market rate or with terms that are more advantageous to the person receiving the loan than terms offered generally on the market;
  - (iv) anything of value provided with an award other than a certificate, plaque or trophy;
  - (v) employment;
  - (vi) admission to an event;
  - (vii) a meal;
  - (viii) lodging;
  - (ix) travel;
  - (x) entertainment for which a charge is normally made; or
  - (xi) a raffle, drawing for a prize, or lottery.

# Gratuity Does Not Include:

- (b) A Gratuity Does Not Include:
- (i) Items included in a contract or grant, or in the proper performance of the requirement of a contract or grant;
- (ii) Items requested to properly evaluate the award of a contract or grant;
- (iii) Rebates, coupons, discounts, sky miles, dividends, or other offerings included in the price of a procurement item;
- (iv) Meals in association with a training seminar included in a contract or grant, or in the proper performance of the requirements of the contract or grant;
- (v) Meals provided by an organization or association that does not, as an organization or association, respond to procurements, including a professional or educational association, an association of vendors, or an association comprised of public entities or public agencies as defined in Section 11-13-103(13).



# Gratuity – Cont'd.

- (vi) **Product samples** submitted to a public entity to assist the public entity in evaluating a request for information, quote, bid, or proposal. Product samples may be returned to the person supplying the product sample or retained by the public entity if the person supplying the product sample does not want the product sample returned, provided:
  - (A) **Product samples not returned become the property of the public entity** and may be used by the public entity to conduct the business of the public entity; and
  - (B) **Product samples not returned may not be retained by a public officer or public employee** for personal use or benefit;
- (vii) **Political campaign contributions;**
- (viii) **Items generally available to the public; or**
- (ix) **Anything of value provide by a public agency as defined in Section 11-13-103(13) to another public agency as defined in Section 11-13-103(13).**

# Definition – Family member

- (4) "Family member" means a father, mother, husband, wife, son, daughter, sister, brother, uncle, aunt, nephew, niece, first cousin, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law.
- Note – similar to Nepotism statute

# Hospitality Gift

- (5) (a) "Hospitality gift" means a promotional or hospitality item, including, a pen, pencil, stationery, toy, pin, trinket, snack, beverage, or appetizer.
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- (b) "Hospitality gift" does not include money, a meal, admittance to an event for which a charge is normally made, entertainment for which a charge is normally made, travel, or lodging.

# Kickback or Bribe

- (6) "Kickback" or "Bribe" means a gratuity given in exchange for favorable treatment in a pending procurement or grant or the administration of a contract or grant.



# Procurement Participant

- (7) (a) “**Procurement participant**” means a person who by title or primary responsibility does not exercise full-time procurement decision making authority **but occasionally is assigned or engaged** in the following activities during the active period of a procurement process:
  - (i) Procuring, awarding, or administering a contract or grant;
  - (ii) Enforcing contract or grant compliance;
  - (iii) Approving contract or grant payments; or
  - (iv) Approving contract or grant change orders or amendments including adding additional monies to a contract or grant.
- (b) “**Procurement participant**” **does not include a person whose duties are merely clerical or administrative** and who has no decision making authority.
- (note – this definition is important as participants are bound by the \$50 limit, not the \$10 limit as well as other differences that will be discussed.)



# Procurement Professional

- (8)(a) “Procurement Professional” means a person who by title or **primary responsibility has procurement decision making authority** and is assigned or engaged in:
  - (i) Procuring, awarding, or administering a contract or grant;
  - (ii) Enforcing contract or grant compliance;
  - (iii) Approving contract or grant payments; or
  - (iv) Approving contract or grant change orders or amendments including adding additional monies to a contract or grant.

# Procurement Professional Does not Include:

- (b) A procurement professional does not include:
- (i) A person holding an elected office, a member of a governing body or board, a chief executive of a public entity and chief assistants and deputies where the chief executive officer and such assistants and deputies have a variety of duties and responsibilities beyond the management of the procurement process, the contract or grant administration process;
- (ii) The following public officials, including their chief assistants and deputies: A Superintendent or Business Administrator of a School District or Local Education Agency; A Principal or Vice Principal of a School or Local Education Agency; A President of a college or university; a chief executive of a local district, a special service district or a political subdivision created under the Interlocal Cooperation Act; and any employee of a public entity with an annual budget of \$1,000,000 or less; or employees of a public entity that has no more than four full-time employees;
- (iii) An Executive Director or Director of a State Department or Division who, by title or primary responsibility, does not have procurement decision making authority and is not assigned or engaged in the procurement process; and
- (c) The listing of officials and employees in Subsection (8)(b)(i),(ii) and (iii) is not exhaustive.



# Public Entity or Public Agency

- (9) “Public entity” or “public agency” as those terms are used in this Part, includes officers, employees, and official representatives of the public entity or public agency.
- (note – Public Agency as used in Part 23 is very broad, includes Feds, tribes, other states, etc.)

# Prohibition – Procurement Professional

- **63-6a-2304. Unlawful Gratuities, Kickbacks, or Bribes related to Procurement Professional.**
- (1) It is unlawful for a person or entity who currently has a contract or grant from the public entity or is seeking a contract or grant from the public entity to knowingly and intentionally give, offer, or promise to give a gratuity, kickback or bribe to:
  - (a) a procurement professional ; or
  - (b) an individual who the person knows is a family member of a procurement professional.
- (2) It is unlawful for a procurement professional to knowingly and intentionally receive, offer to receive, accept, or ask for a promise of a gratuity, kickback or bribe from a person or entity who currently has a contract or grant from the public entity or is seeking a contract or grant from the public entity.
- (3) A procurement professional is subject to the provisions of this Part at all times and not solely during an active period of procurement.

# Hospitality Gifts to Professional

- **63-6a-2304.5 Hospitality Gifts.**
- (1) A person is not guilty of a violation of Section 63-6a-2304 if:
- (a) the total value of a hospitality gift given, offered, or promised to, or received or accepted by a procurement professional at any one time from any one person or entity that currently has a contract with or a grant from the public entity or is seeking a contract or grant from the public entity, is less than \$10; and
- (b) the total value of all hospitality gifts given, offered, or promised to, or received or accepted by, the procurement professional from any one person or entity who currently has a contract or grant from the public entity or is seeking a contract or grant from the public entity, is less than \$50 in a calendar year.



## 63-6a-2305. Unlawful Gratuities, Kickbacks or Bribes related to a Procurement Participant.

- (1) A procurement participant shall be subject to all applicable laws, including bribery and ethics statutes, with the following exceptions:
- (a) The occasional nonpecuniary \$50 gift limit outlined in ethics statutes is capped at \$50 per active period of a procurement from a person or entity seeking a contract or grant from the public entity;
- (b) For procurement participants involved in the administration of multiyear -contracts, the occasional nonpecuniary \$50 gift limit outlined in ethics statutes is capped at \$50 per year from a person or entity who currently has a contract or grant from the public entity; and
- (c) The \$50 limit described in (a) and (b) applies cumulatively to all gifts from owners, partners, employees, and associates affiliated with a person or entity that has a current contract or is seeking a contract from a public entity.
- (Note: Procurement Participant restriction very similar to Ethics Act – except the “occasionally” is limited.)

# Donations or Contributions

- 
- **63-6a-2306. Donations or Contributions.**
- (1) A person is not guilty of a violation of Section 63-6a-2304, Section 63-6a-2304.5 or Section 63-6a-2305 for giving, offering, or promising a donation or contribution to a public entity, unless the donation or contribution is given, offered, or promised with the intent to induce the public entity to award a grant, make a procurement decision, or take action in relation to the administration of a contract, in reciprocation for the contribution.
- (2) A person is not guilty of a violation of Section 63-6a-2304, Section 63-6a-2304.5 or Section 63-6a-2305 for receiving or accepting a donation or contribution on behalf of a public entity, unless the person accepts or receives the donation or contribution in exchange for issuing a grant, making a procurement decision, taking action in relation to a grant, or administration of a contract, in reciprocation for the donation or contribution.
- (3) A person is not guilty of a violation of Section 63-6a-2304, Section 63-6a-2304.5 or Section 63-6a-2305 if the person gives, offers, or makes a pledge, in the form of a donation or contribution to an organization to which a procurement professional or procurement participant belongs, unless the donation or contribution is given, offered, or pledged with the intent to induce a person to award a grant or contract, make a procurement decision, or take action in relation to the administration of a grant or contract in reciprocation for the contribution.

# Criminal Penalties

## ➤ 23-6a-2307. Penalties.

(1) A person who violates this Part is guilty of:

(a) a felony of the second degree if the total value of the unlawful gratuity, kickback or bribe is \$1,000 or more;

➤ (b) a felony of the third degree if the total value of the unlawful gratuity, kickback or bribe is \$250 or more, but less than \$1,000;

➤ (c) a class A misdemeanor if the total value of the unlawful gratuity, kickback or bribe is \$100 or more, but less than \$250; or

➤ (d) a class B misdemeanor if the total value of the unlawful gratuity, kickback or bribe is less than \$100.



## 63G-6a-2308. Penalties for artificially dividing a purchase.

- A person who knowingly and intentionally violates Subsection 63G-6a-408 (8) or (9) [small purchases] is guilty of:
  - (1) a felony of the second degree if the cumulative or total value of the procurement item or the cumulative value of the artificially divided procurements (use similar language on the following sentences) is \$1,000,000 or more;
  - (2) a felony of the third degree if the cumulative or total value of the divided procurements is \$250,000 or more, but less than \$1,000,000;
  - (3) a class A misdemeanor if the cumulative or total value of the divided procurements is \$100,000 or more, but less than \$250,000;
  - or
  - (4) a class B misdemeanor if the cumulative or total value of the divided procurements is less than \$100,000.

## 63G-6a-2309. Disciplinary Action and Civil Penalties.

- (1) Except as provided in Subsection (2), in addition to any other applicable penalty, a public officer or public employee who intentionally violates a provision of this Part may be subject to any or all of the following to the extent consistent with and pursuant to the procedure described in applicable law and in accordance with rules and regulations enacted pursuant to law:
  - (a) dismissed from employment;
  - (b) other disciplinary action;
  - (c) removal from office;
  - (d) being required to return the value of any unlawful gratuity, kickback or bribe; and
  - (e) other civil penalties as prescribed by law.
- (2) A person holding an elected office who intentionally violates a provision of this Part may be disciplined or removed from office only in accordance with the requirements of law relating to discipline of the elected official or removal of the elected official from office.



# Contract Voidable (**current Part 23 – Void!**)

- **63G-6a-2310. Contract awarded in relation to criminal conduct voidable.**
- (1) If a person who is awarded a contract or grant intentionally violates a provision of this Part, **the governing body or chief executive officer of the public entity, in its sole discretion, may declare the contract or grant to be void and unenforceable.**
- (2) A contract or grant is not voidable and cannot be declared void:
  - (a) if the contract, grant or commitment of the public entity relates to a bond or other borrowing once the bond or other evidence of debt has been issued;
  - (b) if the issuance of a contract or grant is relied upon by third parties; or
  - (c) to the extent related to the proper performance and value provided to the public entity up to the date of notification of the contract or grant being void and unenforceable.
- (3) Subsection (1) shall only apply to procurements that have commenced on or after July 1, 2014. For the purposes of this section, commencement shall be deemed to occur upon the public notice of any procurement or if it is procurement where public notice is not required, at the time of the initial contact for purposes of the procurement between the public entity and the contractor.

## 63G-6a-2311. Evaluation Committee Members.

- Nothing in this Part restricts an applicable rulemaking authority from requiring that **evaluation committee members disclose conflicts of interest or removing an evaluation committee member for having a conflict of interest.**

# Report Violations

➤ **63G-6a-2312. Duty to report factual information.**

If a procurement professional has actual knowledge that a person has engaged in a violation of Section 63G-6a-2304, undue influence, collusion, or other anticompetitive practices relating to a procurement or a potential procurement, the procurement professional shall **transmit a notice of the relevant facts to the appropriate prosecuting attorney or the attorney general**. Failure to so report may subject the procurement professional to disciplinary action and civil penalties under Section 63G-6a-2309.

# NASPO - Socialization

- **Do Not Socialize With Vendors [or Recuse Yourself]**
- **NASPO:** *“This guideline applies equally to business associations. If a procurement professional wants to fraternize with a trade association, he or she should get out of the procurement process relating to that area of trade entirely, before any such association occurs.”* **National Association of State Procurement Officials, State & Local Government Procurement – A Practical Guide, p. 29**
- **From Purchasing Website**

# Socialization – Recuse Yourself

- **Do Not Socialize With Vendors [or Recuse Yourself]**
- **NASPO:** *“Prosecutors prove antitrust and procurement offenses through testimony that establishes that government officials socialized with government vendors. If a procurement officer has social friends who may be bidders, he or she should remove himself or herself completely from every aspect of a procurement process involving them.”*
- **National Association of State Procurement Officials**
- **State & Local Government Procurement – A Practical Guide, p. 29** (From Purchasing Website)

# Socialization – Practice Tip

- If you are asked to be involved in a procurement, contract or grant that involves a, interaction with a prospective vendor, a relative, a friend or someone that reasonable people would believe could taint your judgment, communicate this with your manager. Your manager may assign someone else to the task. We need to honor Constitutional rights and at the same time, protect the integrity of our procurement, contract and grant processes.



# Purpose of Procurement Code

- **63G-6a-102. Purpose of chapter.**
- The underlying purposes and policies of this chapter are:
  - (1) to simplify, clarify, and modernize the law governing procurement by this state;
  - (2) to ensure the **fair and equitable treatment** of all persons who deal with the procurement system of this state;
  - (3) to provide increased economy in state procurement activities; and
  - (4) to foster effective **broad-based competition** within the free enterprise system.

# Attorney General

- **63G-6a-106 Specific statutory authority -- Limitations on authority of chief procurement officer and division.**
- (1) The procurement authority given to a procurement unit under the following provisions shall be retained, and shall be applied only to the extent described in those provisions:
- . . .
- (c) **Title 67, Chapter 5, Attorney General;**
- (2) Except as otherwise provided in Sections 63G-6a-105 and 63G-6a-107, a procurement unit shall conduct a procurement in accordance with this chapter.
- (3) (a) The Department of Transportation may make rules governing the procurement of highway construction or improvement.
- (b) The applicable rulemaking authority for a public transit district may make rules governing the procurement of a transit construction project or a transit improvement project.
- (c) This Subsection (3) supersedes Subsections (1) and (2).

# Attorney General, Cont'd.

- (4) Except to the extent otherwise agreed to in a memorandum of understanding between the division and the following entities, the authority of the chief procurement officer and of the division does not extend to a procurement unit with independent procurement authority.
  - (5) An entity described in Subsection (4) may, without supervision, interference, or involvement by the chief procurement officer or the division, but consistent with the requirements of this chapter:
    - (a) engage in a standard procurement process;
    - (b) procure an item under an exception, as provided in this chapter, to the requirement to use a standard procurement process; or
    - (c) otherwise engage in an act authorized or required by this chapter.
  - (6) The attorney general may, in accordance with the provisions of this chapter, but without involvement by the division or the chief procurement officer:
    - (a) retain outside counsel; or
    - (b) procure litigation support services, including retaining an expert witness.

## NOTE: AG has procurement rules

- **Attorney General**  
R105. Administration.
- **R105. Administration.**  
R105-1. Attorney General's Selection of Outside Counsel, Expert Witnesses and Other Litigation Support Services.
- R105-2. Records Access and Management.
- **R105-1. Attorney General's Selection of Outside Counsel, Expert Witnesses and Other Litigation Support Services.**  
R105-1-1. Authority and Purpose.
- R105-1-2. Definitions.
- R105-1-3. Scope.
- R105-1-4. Determination of Small Purchase, Sole Source, Emergency, or Waiver of Request for Proposals.
- R105-1-5. Use of Competitive Sealed Proposals in Lieu of Competitive Sealed Bids.
- R105-1-6. Selection of Outside Counsel, Expert Witnesses and Providers of Litigation Support Services Other than through Small Purchase, Sole Source, or Emergency, or Waiver of Request for Proposals Provisions.
- R105-1-7. Small Purchases.
- R105-1-8. Sole Source.
- R105-1-9. Emergencies.
- R105-1-10. Waiver of Request for Proposals.
- R105-1-11. Competitive Proposals for Small Purchases or Emergencies.
- R105-1-12. Proposals May Not Be Dependent on Proposals Submitted by Others.
- R105-1-13. Contracts.
- R105-1-14. Retention and Non-availability of Files.



# Auditor and Treasurer

(8) The state auditor's office may, in accordance with the provisions of this chapter, but without involvement by the division or the chief procurement officer, procure audit services.

(9) The state treasurer may, in accordance with the provisions of this chapter, but without involvement by the division or the chief procurement officer, procure:

- (a) deposit and investment services; and
- (b) services related to issuing bonds.
- Amended by Chapter 445, 2013 General Session

➤

# Exemptions

- **63G-6a-107 Exemptions from chapter -- Compliance with federal law.**
- (1) **Except for Part 23, Unlawful Conduct and Penalties**, the provisions of this chapter are not applicable to:
  - (a) funds administered under the Percent-for-Art Program of the Utah Percent-for-Art Act;
  - (b) **grants awarded by the state** or contracts between the state and any of the following:
    - (i) an educational procurement unit;
    - (ii) a conservation district;
    - (iii) a local building authority;
    - (iv) a local district;
    - (v) a public corporation;
    - (vi) a special service district;
    - (vii) a public transit district; or
    - (viii) two or more of the entities described in Subsections (1)(b)(i) through (vii), acting under legislation that authorizes intergovernmental cooperation; . . .



# Prequalification Process

- **63G-6a-403 Prequalification of potential vendors. . . .**
- (v) the period of time during which the list of prequalified potential vendors will remain in effect, which may not be longer than **18 months** after the list of prequalified potential vendors is made available to the public under Subsection (8)(b)

# Public Notice

- **63G-6a-406. Public notice of procurement process or sole source procurement.**
- (1) The division or a procurement unit with independent procurement authority that issues an invitation for bids, a request for proposals, or a notice of sole source procurement required to be published in accordance with this section, shall provide public notice that includes:
  - (a) for an invitation for bids or a request for proposals, the name of the issuing procurement unit;
  - (b) the name of the procurement unit acquiring the procurement item;
  - (c) for an invitation for bids or a request for proposals, information on how to contact the issuing procurement unit in relation to the invitation for bids or request for proposals;
  - (d) for a notice of sole source procurement, contact information and other information relating to contesting, or obtaining additional information in relation to, the sole source procurement;
  - (e) for an invitation for bids or a request for proposals, the date of the opening and closing of the invitation for bids or request for proposals;
  - (f) for a notice of sole source procurement, the earliest date that the procurement unit may make the sole source procurement;
  - (g) information on how to obtain a copy of the invitation for bids, request for proposals, or further information related to the sole source procurement; and
  - (h) a general description of the procurement items that will be obtained through the standard procurement process or sole source procurement.

➤

# Public Notice, Cont'd.

- (2) Except as provided in Subsection (4), **for an invitation for bids or a request for proposals**, the issuing procurement unit shall publish the notice described in Subsection (1), using at least one of the following methods:
  - (a) **at least seven days** before the day of the deadline for submission of a bid or other response, publish the notice:
    - (i) in a newspaper of general circulation in the state; or
    - (ii) in a newspaper of local circulation in the area:
      - (A) directly impacted by the procurement; or
      - (B) over which the procurement unit has jurisdiction; or
    - (b) at least seven consecutive days before the day of the deadline for submission of a bid or other response, publish the notice:
      - (i) on the main website for the issuing procurement unit or the procurement unit acquiring the procurement item; or
      - (ii) **on a state website that is owned, managed by, or provided under contract with, the division for posting a public procurement notice.**

# Sole Source Notice

- (3) Except as provided in Subsection (4), **for a sole source procurement** for which notice is required to be published in accordance with this section, the procurement unit making the sole source procurement shall publish the notice described in Subsection (1), using at least one of the following methods:
  - (a) at least **seven days** before the day on which the procurement unit makes the sole source procurement, publish the notice:
    - (i) in a newspaper of general circulation in the state; or
    - (ii) in a newspaper of local circulation in the area:
      - (A) directly impacted by the procurement; or
      - (B) over which the procurement unit has jurisdiction; or
  - (b) at least seven consecutive days before the day on which the procurement unit makes the sole source procurement, publish the notice:
    - (i) **on the main website** for the procurement unit acquiring the procurement item; or
    - (ii) **on a state website** that is owned by, managed by, or provided under contract with, the division for posting a procurement notice.
- (4) **An issuing procurement unit, or the procurement unit making a sole source procurement may reduce the seven-day period described in Subsection (2) or (3), if the procurement officer or the procurement officer's designee signs a written statement that:**
  - (a) states that a shorter time is needed; and
  - (b) as it relates to an invitation for bids or a request for proposals, determines that competition from multiple sources may be obtained within the shorter period of time.



# Make copies available

- (5)(a) An issuing procurement unit shall make a copy of an invitation for bids or a request for proposals available for public inspection at the main office of the issuing procurement unit or on the website described in Subsection (2)(b).
- (b) A procurement unit making a sole source procurement shall make a copy of information related to the sole source procurement available for public inspection at the main office of the procurement unit or on the website described in Subsection (3)(b).
- Amended by Chapter 445, 2013 General Session

# Small Purchases (see AG Rule)

- **63G-6a-408 Small purchases.**
- (1) As used in this section:
- (a) "Annual cumulative threshold" means the maximum total annual amount, established by the applicable rulemaking authority under Subsection (2)(a)(i), that a procurement unit may expend to obtain procurement items from the same source under this section.
- (b) "Individual procurement threshold" means the maximum amount, established by the applicable rulemaking authority under Subsection (2)(a)(ii), for which a procurement unit may purchase a procurement item under this section.
- (c) "Single procurement aggregate threshold" means the maximum total amount, established by the applicable rulemaking authority under Subsection (2)(a)(iii), that a procurement unit may expend to obtain multiple procurement items from one source at one time under this section.
- (2) **The applicable rulemaking authority may make rules governing small purchases, including:**
- (a) establishing expenditure thresholds, including:
  - (i) an annual cumulative threshold;
  - (ii) an individual procurement threshold; and
  - (iii) a single procurement aggregate threshold;
- (b) establishing procurement requirements relating to the thresholds described in Subsection (2)(a); and
- (c) the use of electronic, telephone, or written quotes.
- (3) Expenditures made under this section by a procurement unit may not exceed a threshold established by the applicable rulemaking authority, unless the chief procurement officer or the head of a procurement unit with independent procurement authority gives written authorization to exceed the threshold that includes the reasons for exceeding the threshold.



# Small Purchasing, Cont'd.

- (4) Except as provided in Subsection (5), an executive branch procurement unit may not obtain a procurement item through a small purchase standard procurement process if the procurement item may be obtained through a state cooperative contract or a contract awarded by the chief procurement officer under Subsection 63G-6a-2105(1).
- (5) Subsection (4) does not apply if:
  - (a) the procurement item is obtained for an unanticipated, urgent or unanticipated, emergency condition, including:
    - (i) an item needed to avoid stopping a public construction project;
    - (ii) an immediate repair to a facility or equipment; or
    - (iii) another emergency condition; or
  - (b) the chief procurement officer or the head of a procurement unit that is an executive branch procurement unit with independent procurement authority:
    - (i) determines in writing that it is in the best interest of the procurement unit to obtain an individual procurement item outside of the state contract, comparing:
      - (A) the contract terms and conditions applicable to the procurement item under the state contract with the contract terms and conditions applicable to the procurement item if the procurement item is obtained outside of the state contract;
      - (B) the maintenance and service applicable to the procurement item under the state contract with the maintenance and service applicable to the procurement item if the procurement item is obtained outside of the state contract;
      - (C) the warranties applicable to the procurement item under the state contract with the warranties applicable to the procurement item if the procurement item is obtained outside of the state contract;
      - (D) the quality of the procurement item under the state contract with the quality of the procurement item if the procurement item is obtained outside of the state contract; and
      - (E) the cost of the procurement item under the state contract with the cost of the procurement item if the procurement item is obtained outside of the state contract;
    - (ii) for a procurement item that, if defective in its manufacture, installation, or performance, may result in serious physical injury, death, or substantial property damage, determines in writing that the terms and conditions, relating to liability for injury, death, or property damage, available from the source other than the contractor who holds the state contract, are similar to, or better than, the terms and conditions available under the state contract; and
    - (iii) grants an exception, in writing, to the requirement described in Subsection (4).
-

# Small Purchase Restrictions

- (6) Except as otherwise expressly provided in this section, a procurement unit:
  - (a) **may not use the small purchase standard procurement process described in this section for ongoing, continuous, and regularly scheduled procurements that exceed the annual cumulative threshold; and**
  - (b) shall make its ongoing, continuous, and regularly scheduled procurements that exceed the annual cumulative threshold through a contract awarded through another standard procurement process described in this chapter or an applicable exception to another standard procurement process, described in Part 8, Exceptions to Procurement Requirements.
- (7) This section does not prohibit regularly scheduled payments for a procurement item obtained under another provision of this chapter.
- (8) **It is unlawful for a person to intentionally or knowingly divide a procurement into one or more smaller procurements with the intent to make a procurement:**
  - (a) qualify as a small purchase, if, before dividing the procurement, it would not have qualified as a small purchase; or
  - (b) meet a threshold established by rule made by the applicable rulemaking authority, if, before dividing the procurement, it would not have met the threshold.
- (9) A division of a procurement that is prohibited under Subsection (8) includes doing any of the following with the intent or knowledge described in Subsection (8):
  - (a) making two or more separate purchases;
  - (b) dividing an invoice or purchase order into two or more invoices or purchase orders; or
  - (c) making smaller purchases over a period of time.
- (10) **A person who violates Subsection (8) is subject to the criminal penalties described in Section 63G-6a-2305.**
- (11) The Division of Finance within the Department of Administrative Services may conduct an audit of an executive branch procurement unit to verify compliance with the requirements of this section.

# Complete Training by Purchasing

- (12) An executive branch procurement unit may not make a small purchase after January 1, 2014, unless the chief procurement officer certifies that the person responsible for procurements in the procurement unit has satisfactorily completed training on this section and the rules made under this section.



# RFI added to Code

## ➤ **63G-6a-502 Purpose of request for information.**

- (1) The purpose of a request for information is to:
  - (a) obtain information, comments, or suggestions from potential bidders or offerors before issuing an invitation for bids or request for proposals;
  - (b) determine whether to issue an invitation for bids or a request for proposals; and
  - (c) generate interest in a potential invitation for bids or a request for proposals.
- (2) A request for information may be useful in order to:
  - (a) prepare to issue an invitation for bids or request for proposals for an unfamiliar or complex procurement;
  - (b) determine the market availability of a procurement item; or
  - (c) determine best practices, industry standards, performance standards, product specifications, and innovations relating to a procurement item.

## ➤ **63G-6a-505 Protected information.**

- Information submitted to or by a governmental entity in response to a request for information is protected under Section 63G-2-305.

# Part 6 - Bidding

- **63G-6a-601 Title.**
- This part is known as "Bidding."
- **63G-6a-602 Contracts awarded by bidding.**
- (1) Except as otherwise provided in this chapter, the division or a procurement unit with independent procurement authority shall award a contract for a procurement by bidding, in accordance with the rules of the applicable rulemaking authority.
- (2) The bidding standard procurement process is appropriate to use when cost is the major factor in determining the award of a procurement.

# Multiple Stage Bidding Process

- **63G-6a-609 Multiple stage bidding process.**
- (1) The division or a procurement unit with independent procurement authority may conduct a bid in multiple stages, to:
  - (a) **narrow the number of bidders** who will progress to a subsequent stage;
  - (b) **prequalify bidders** for subsequent stages, in accordance with Section 63G-6a-403;
  - (c) enter into a contract for a single procurement; or
  - (d) award multiple contracts for a series of upcoming procurements.



# The RFP !

- **63G-6a-702 Contracts awarded by request for proposals.**
- (1) A request for proposals standard procurement process may be used instead of bidding if the procurement officer determines, in writing, that the request for proposals standard procurement process will provide the best value to the procurement unit.
- (2) The request for proposals standard procurement process is appropriate to use for:
  - (a) the procurement of professional services;
  - (b) a design-build procurement;
  - (c) when cost is not the most important factor to be considered in making the selection that is most advantageous to the procurement unit; or
  - (d) when factors, in addition to cost, are highly significant in making the selection that is most advantageous to the procurement unit.

# Some Evaluation Committee Requirements

- (3) The issuing procurement unit shall:
  - (a) appoint an evaluation committee consisting of at least three individuals; and
  - (b) ensure that the evaluation committee and each member of the evaluation committee:
    - (i) does not have a conflict of interest with any of the offerors;
    - (ii) can fairly evaluate each proposal;
    - (iii) does not contact or communicate with an offeror for any reason other than conducting the standard procurement process; and
    - (iv) conducts the evaluation in a manner that ensures a fair and competitive process and avoids the appearance of impropriety.
- (4) The evaluation committee may conduct interviews with, or participate in presentations by, the offerors.
- (5) Except as provided in Subsection (6) or (7), each member of the evaluation committee is prohibited from knowing, or having access to, any information relating to the cost, or the scoring of the cost, of a proposal until after the evaluation committee submits its final recommended scores on all other criteria to the issuing procurement unit.

# RFP – Cost Benefit Analysis

## 63G-6a-708 Cost-benefit analysis.

- (1) If the highest score awarded by the evaluation committee, including the score for cost, is awarded to a proposal other than the lowest cost proposal, and the difference between the cost of the highest scored proposal and the lowest cost proposal exceeds the greater of \$10,000 or 5% of the lowest cost proposal, the issuing procurement unit shall make an informal written cost-benefit analysis that:
  - (a) explains, in general terms, the advantage to the procurement unit of awarding the contract to the higher cost offeror;
  - (b) includes, except as provided in Subsection (1)(c), the estimated added financial value to the procurement unit of each criteria that justifies awarding the contract to the higher cost offeror;
  - (c) includes, to the extent that assigning a financial value to a particular criteria is not practicable, a statement describing:
    - (i) why it is not practicable to assign a financial value to the criteria; and
    - (ii) in nonfinancial terms, the advantage to the procurement unit, based on the particular criteria, of awarding the contract to the higher cost offeror;
  - (d) demonstrates that the value of the advantage to the procurement unit of awarding the contract to the higher cost offeror exceeds the value of the difference between the cost of the higher cost proposal and the cost of the lower cost proposals; and
  - (e) includes any other information required by rule made by the applicable rulemaking authority.
  -

# Cost Benefit Analysis, Cont'd.

- (2) If the informal cost-benefit analysis described in Subsection (1) does not justify award of the contract to the offeror that received the highest score, the issuing procurement unit:
  - (a) may not award the contract to the offeror that received the highest score; and
  - (b) may award the contract to the offeror that received the next highest score, unless:
    - (i) an informal cost-benefit analysis is required, because the difference between the cost proposed by the offeror that received the next highest score and the lowest cost proposal exceeds the greater of \$10,000 or 5% of the lowest cost proposal; and
    - (ii) the informal cost-benefit analysis does not justify award of the contract to the offeror that received the next highest score.
- (3) If the informal cost-benefit analysis described in Subsection (1) does not justify award of the contract to the offeror, described in Subsection (2), that received the next highest score, the issuing procurement unit:
  - (a) may not award the contract to the offeror that received the next highest score; and
  - (b) shall continue with the process described in Subsection (2) for each offeror that received the next highest score, until the issuing procurement unit:
    - (i) awards the contract in accordance with the provisions of this section; or
    - (ii) cancels the request for proposals.
-



# When CBA Not Required

- (4) (a) An issuing procurement unit is not required to make the cost-benefit analysis described in this section for a contract with a construction manager/general contractor if the contract is awarded based solely on the qualifications of the construction manager/general contractor and the management fee described in Subsection 63G-6a-706(6).
- (b) The applicable rulemaking authority shall make rules that establish procedures and criteria for awarding a contract described in Subsection (4)(a) to ensure that:
  - (i) a competitive process is maintained; and
  - (ii) the contract awarded is in the best interest of the procurement unit.
- Amended by Chapter 445, 2013 General Session



# RFPs may use multiple stages

- **63G-6a-710 Multiple stage process.**
- (1) The division or a procurement unit with independent procurement authority may conduct a request for proposals in stages, where an earlier stage is used to qualify offerors for subsequent stages or to narrow the number of offerors that will move on to subsequent stages.
- (2) Except as otherwise expressly provided in this section, the division or a procurement unit with independent procurement authority shall conduct a multiple stage process in accordance with this part.



# Sole Source Procurement

- **63G-6a-802 Sole source -- Award of contract without competition -- Notice.**
- (2) The division or a procurement unit with independent procurement authority may award a contract for a procurement item without competition if the procurement officer, the head of the procurement unit, or a designee of either who is senior to the procurement officer or the head of the procurement unit, determines in writing that:
  - (a) there is only one source for the procurement item; or
  - (b) the award to a specific supplier, service provider, or contractor is a **condition of a donation** that will fund the full cost of the supply, service, or construction item.
- (3) Circumstances under which there is only one source for a procurement item may include:
  - (a) where the most important consideration in obtaining a procurement item is the compatibility of equipment, technology, software, accessories, replacement parts, or service;
  - (b) where a procurement item is needed for trial use or testing;
  - (c) where transitional costs are unreasonable or cost prohibitive; or
  - (d) procurement of public utility services.
-

# Publication of Sole Sources

- (4) The applicable rulemaking authority shall make rules regarding the publication of notice for a sole source procurement that, at a minimum, require publication of notice of a sole source procurement, in accordance with Section 63G-6a-406, if the cost of the procurement exceeds \$50,000.
- (5) The division or a procurement unit with independent procurement authority who awards a sole source contract on behalf of another procurement unit shall **negotiate with the contractor** to ensure that the terms of the contract, including price and delivery, are in the best interest of the procurement unit.
- (6) The division or a procurement unit with independent procurement authority **may extend a contract** for a reasonable period of time without engaging in a standard procurement process, if:
  - (a) the award of a new contract for the procurement item is delayed due to a protest or appeal;
  - (b) the standard procurement process is delayed due to unintentional error;
  - (c) changes in industry standards require significant changes to specifications for the procurement item;
  - (d) the extension is necessary to prevent the loss of federal funds;
  - (e) the extension is necessary to address a circumstance where the appropriation of state or federal funds has been delayed; or
  - (f) the extension covers the period of time during which contract negotiations with a new provider are being conducted.

# New Provision on Tax Liens

- **63G-6a-905. Quote, bid, offer, or contract prohibited by person with outstanding tax lien -- Exceptions -- Rejection of quote, bid, or offer.**
- (1) Except as provided in Subsection (2), **a person with an outstanding tax lien in the state may not:**
  - **(a) submit a quote, bid, or offer** to a procurement unit; or
  - **(b) contract** to provide a procurement item to a procurement unit.
- (2) Subsection (1) **does not apply to the extent that a procurement officer determines it is in the public interest to grant an exception** to the requirements of Subsection (1) for a particular quote, bid, offer, or contract specified by the procurement officer.
- 
- (3) A procurement unit may reject a quote, bid, or offer submitted in violation of Subsection (1).
- 
- Enacted by Chapter 445, 2013 General Session

# Multiyear Contracts

- **63G-6a-1204. Multiyear contracts.**
- (1) Except as provided in Subsection (7), a procurement unit may enter into a multiyear contract resulting from an invitation for bids or a request for proposals, if:
  - (a) the procurement officer determines, in the discretion of the procurement officer, that entering into a multiyear contract is in the best interest of the procurement unit; and
  - (b) the invitation for bids or request for proposals:
    - (i) **states the term of the contract, including all possible renewals of the contract;**
    - (ii) **states the conditions for renewal of the contract;** and
    - (iii) includes the provisions of Subsections (3) through (5) that are applicable to the contract.
- (2) In making the determination described in Subsection (1)(a), the procurement officer shall consider whether entering into a multiyear contract will:
  - (a) result in significant savings to the procurement unit, including:
    - (i) reduction of the administrative burden in procuring, negotiating, or administering contracts;
    - (ii) continuity in operations of the procurement unit; or
    - (iii) the ability to obtain a volume or term discount;
  - (b) encourage participation by a person who might not otherwise be willing or able to compete for a shorter term contract; or
  - (c) provide an incentive for a bidder or offeror to improve productivity through capital investment or better technology.

# Multiyear – Cont'd.

- (3) (a) The determination described in Subsection (1)(a) is discretionary and is not required to be in writing or otherwise recorded.
- (b) Except as provided in Subsections (4) and (5), notwithstanding any provision of an invitation for bids, a request for proposals, or a contract to the contrary, a multiyear contract, including a contract that was awarded outside of an invitation for bids or request for proposals process, **may not continue or be renewed for any year after the first year of the multiyear contract if adequate funds are not appropriated** or otherwise available to continue or renew the contract.
- (4) **A multiyear contract that is funded solely by federal funds may be continued or renewed for any year after the first year of the multiyear contract if:**
  - (a) adequate funds to continue or renew the contract have not been, but are expected to be appropriated by, and received from, the federal government;
  - (b) continuation or renewal of the contract before the money is appropriated or received is permitted by the federal government; and
  - (c) the contract states that it may be cancelled, without penalty, if the anticipated federal funds are not appropriated or received.
- (5) A multiyear contract that is funded in part by federal funds may be continued or renewed for any year after the first year of the multiyear contract if:
  - (a) the portion of the contract that is to be funded by funds of a public entity are appropriated;
  - (b) adequate federal funds to continue or renew the contract have not been, but are expected to be, appropriated by, and received from, the federal government;
  - (c) continuation or renewal of the contract before the federal money is appropriated or received is permitted by the federal government; and
  - (d) the contract states that it may be cancelled, without penalty, if the anticipated federal funds are not appropriated or received.



# Multiyear – Cont'd.

- (6) A procurement unit may not continue or renew a multiyear contract after the end of the multiyear contract term or the renewal periods described in the contract, unless the procurement unit engages in a new standard procurement process or complies with an exception, described in this chapter, to using a standard procurement process.
- (7) A multiyear contract, including any renewal periods, may not exceed a period of five years, unless:
  - (a) the procurement officer determines, in writing, that:
    - (i) a longer period is necessary in order to obtain the procurement item;
    - (ii) a longer period is customary for industry standards; or
    - (iii) a longer period is in the best interest of the procurement unit; and
  - (b) the written determination described in Subsection (7)(a) is included in the file relating to the procurement.
- (8) This section does not apply to a contract for the design or construction of a facility, a road, a public transit project, or a contract for the financing of equipment.

# Multiple Award

- **63G-6a-1204.5. Multiple award contracts.**
- (1) (a) The division or a procurement unit with independent procurement authority **may enter into multiple award contracts** with bidders or offerors.
- (b) The applicable rulemaking authority may make rules, consistent with this section, regulating the use of multiple award contracts.
- (2) Multiple award contracts may be in a procurement unit's best interest if award to two or more bidders or offerors for similar procurement items is needed or desired for adequate delivery, service, availability, or product compatibility.
- (3) A procurement unit that enters into multiple award contracts under this section shall:
  - (a) **exercise care to protect and promote competition** among bidders or offerors when seeking to enter into multiple award contracts;
  - (b) name all eligible users of the multiple award contracts in the invitation for bids or request for proposals; and
  - (c) if the procurement unit anticipates entering into multiple award contracts before issuing the invitation for bids or request for proposals, **state in the invitation for bids or request for proposals that the procurement unit may enter into multiple award contracts at the end of the procurement process.**

# Multiple Award Cont'd.

- (4) A procurement unit that enters into multiple award contracts under this section shall:
  - (a) obtain, under the multiple award contracts, all of its normal, recurring requirements for the procurement items that are the subject of the contracts until the contracts terminate; and
  - (b) reserve the right to obtain the procurement items described in Subsection (4)(a) separately from the contracts if:
    - (i) there is a need to obtain a quantity of the procurement items that exceeds the amount specified in the contracts; or
    - (ii) the procurement officer makes a written finding that the procurement items available under the contract will not effectively or efficiently meet a nonrecurring special need of a procurement unit.
- (5) An applicable rulemaking authority may make rules to further regulate a procurement under this section.
- 
- Renumbered and Amended by Chapter 445, 2013 General Session

# Be aware of Section of Contract Types

- **63G-6a-1205. Regulation of contract types -- Permitted and prohibited contract types.**
- 
- (1) Except as otherwise provided in this section, and subject to rules made under this section by the applicable rulemaking authority, a procurement unit may use any type of contract that will promote the best interests of the procurement unit.
- (2) An applicable rulemaking authority:
- (a) may make rules governing, placing restrictions on, or prohibiting the use of any type of contract; and
- (b) **may not make rules that permit the use of a contract:**
- (i) **that is prohibited under this section; or**
- (ii) **in a manner that is prohibited under this section. ...**

# Prohibitions on Cost and Cost Plus Contracts, Exceptions

- (5) Except as it applies to a change order, a procurement unit may not enter into a cost-plus-percentage-of-cost contract, unless:
  - (a) use of a cost-plus-percentage-of-cost contract is approved by the procurement officer;
  - (b) it is standard practice in the industry to obtain the procurement item through a cost-plus-percentage-of-cost contract; and
  - (c) the percentage and the method of calculating costs in the contract are in accordance with industry standards.
- (6) A procurement unit may not enter into a cost-reimbursement contract, unless the procurement officer makes a written determination that:
  - (a) (i) a cost-reimbursement contract is likely to cost less than any other type of permitted contract; or
  - (ii) it is impracticable to obtain the procurement item under any other type of permitted contract; and
  - (b) the proposed contractor's accounting system:
    - (i) will timely develop the cost data in the form necessary for the procurement unit to timely and accurately make payments under the contract; and
    - (ii) will allocate costs in accordance with generally accepted accounting principles.
-



# New Protest Provisions

- **63G-6a-1602. Protest -- Time -- Authority to resolve protest.**
- (1) Except as provided in Subsection (2), a person who is an actual or prospective bidder, offeror, or contractor who is aggrieved in connection with a procurement or award of a contract may protest to the protest officer as follows:
  - (a) with respect to an invitation for bids or a request for proposals:
    - (i) before the opening of bids or the closing date for proposals; or
    - (ii) if the person did not know and should not have known of the facts giving rise to the protest before the bid opening or the closing date for proposals, **within seven days after the day on which the person knows or should have known of the facts giving rise to the protest; or**
  - (b) if Subsection (1)(a) does not apply, within seven days after the day on which the person knows or should have known of the facts giving rise to the protest.
- **PRACTICE TIP – SEND OUT NOTICE ASAP TO VEST PROCUREMENT ASAP**

# Protest contents

- (3) A person who files a protest under this section shall include in the filing document:
  - (a) the person's address of record and email address of record; and
  - (b) a concise statement of the grounds upon which the protest is made. [NOTE: THIS IS NEW!]
- (4) A person described in Subsection (1), (2), or (3) who fails to timely file a protest under this section may not bring a protest, action, or appeal challenging a solicitation or award of a contract, or a debarment or suspension, before the protest officer, an appeals panel, a court, or any other forum.

# Protest Officer decision (possibly hearing)

- (1) After a timely protest is filed in accordance with Section 63G-6a-1602, the protest officer:
  - (a) shall consider the protest; and
  - (b) **may hold a hearing** on the protest.
- (2) (a) The protest officer may:
  - (i) **subpoena witnesses** and compel their attendance at a protest hearing; or
  - (ii) **subpoena documents** for production at a protest hearing.
- (b) The **Rules of Evidence do not apply** to a protest hearing.
- (c) The **applicable rulemaking authority shall make rules relating to intervention in a protest, including designating:**
  - (i) **who may intervene; and**
  - (ii) **the time and manner of intervention.**
- (d) If a hearing on a protest is held under this section, the protest officer shall:
  - (i) **record the hearing;**
  - (ii) **preserve all evidence** presented at the hearing; and
  - (iii) preserve all records and other evidence relied upon in reaching the written decision described in this section.
- (e) Regardless of whether a hearing on a protest is held under this section, the protest officer shall preserve all records and other evidence relied upon in reaching the written decision.
- (f) **The records described in Subsections (2)(d) and (e) may not be destroyed until the decision, and any appeal of the decision, becomes final.**

Appeal is to Procurement Policy Board

- **63G-6a-1702. Appeal to Utah State Procurement Policy Board -- Appointment of procurement appeals panel -- Proceedings.**
- **(Previously – the appeal was to District Court or a Procurement Appeals Board. There are many changes in this area of the Procurement Code. Careful reading is necessary.)**

# Bond requirement is new

- **63G-6a-1703. Requirement to post a security deposit or bond -- Exceptions -- Forfeiture of security deposit or bond.**
- (1) Except as provided by rule made under Subsection (2)(a), a person who files an appeal under Section 63G-6a-1702 shall, at the time that the appeal is filed, pay a security deposit or post a bond with the protest officer in an amount that is the greater of:
  - (a) for the appeal of a debarment or suspension, \$1,000;
  - (b) for any type of procurement, \$1,000;
  - (c) for an invitation for bids, 5% of:
    - (i) the lowest bid amount, if the bid opening has occurred; or
    - (ii) the estimated contract cost, established in accordance with Subsection (2)(b), if the bid opening has not yet occurred;
  - (d) for a request for proposals, 5% of:
    - (i) the lowest cost proposed in a response to a request for proposals, if the opening of proposals has occurred; or
    - (ii) the estimated contract cost, established in accordance with Subsection (2)(b), if the opening of proposals has not occurred; or
  - (e) for a type of procurement other than an invitation for bids or a request for proposals, the amount established in accordance with Subsection (2).



# Bond Requirements, Cont'd.

- (2) **The board shall make rules**, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, that establish:
- (a) **circumstances and procedures under which the requirement for paying a security deposit or posting a bond may be waived or reduced on grounds, including:**
  - (i) that the person filing the appeal is impecunious;
  - (ii) circumstances where certain small purchases are involved; or
  - (iii) other grounds determined by the Division of Purchasing and General Services to be appropriate; and
- (b) the method used to determine:
  - (i) the estimated contract cost described in Subsections (1)(c)(ii) and (1)(d)(ii); and
  - (ii) the amount described in Subsection (1)(e).
- (3) **The chair of the board shall dismiss a protest filed under Section 63G-6a-1702 if the actual or prospective bidder, offeror, or contractor fails to timely pay the security deposit or post the bond required under Subsection (1).**

# Bond Requirements, Cont'd.

- (4) The chair of the board shall:
  - (a) retain the security deposit or bond until the protest and any appeal of the protest decision is final;
  - (b) as it relates to a security deposit:
    - (i) deposit the security deposit into an interest-bearing account; and
    - (ii) after any appeal of the protest decision becomes final, return the security deposit and the interest it accrues to the person who paid the security deposit, unless the security deposit is forfeited to the General Fund under Subsection (5); and
  - (c) as it relates to a bond:
    - (i) retain the bond until the protest and any appeal of the protest decision becomes final; and
    - (ii) after the protest and any appeal of the protest decision becomes final, return the bond to the person who posted the bond, unless the bond is forfeited to the General Fund under Subsection (5).
- (5) A security deposit that is paid, or a bond that is posted, under this section shall forfeit to the General Fund if:
  - (a) the person who paid the security deposit or posted the bond fails to ultimately prevail on appeal; and
  - (b) the procurement appeals panel finds that the protest or appeal is frivolous or that its primary purpose is to harass or cause a delay.
- Amended by Chapter 445, 2013 General Session

# Appeal to Court of Appeals

- **63G-6a-1802. Appeal to Utah Court of Appeals -- Jurisdiction of district court.**
- (1) (a) Subject to Subsection (2), a **person who receives an adverse decision, or a procurement unit, may appeal a decision of a procurement appeals panel to the Utah Court of Appeals within seven days** after the day on which the decision is issued. . . .

# Circumstances when agency may go ahead with a procurement notwithstanding a protest or appeal

- **63G-6a-1903. Effect of timely protest or appeal.**
- In the event of a timely protest under Subsection 63G-6a-1602(1), or a timely appeal of the protest under Section 63G-6a-1702 or 63G-6a-1802, a procurement unit, other than a legislative procurement unit, a judicial procurement unit, a local government procurement unit, or a public transit district, **may not proceed further with the solicitation or with the award of the contract until:**
  - (1) all administrative and judicial remedies are exhausted;
  - (2) for a protest under Section 63G-6a-1602 or an appeal under Section 63G-6a-1702:
    - (a) the chief procurement officer, after consultation with the attorney general's office and the head of the using agency, makes a written determination that award of the contract without delay is necessary to protect substantial interests of the state;
    - (b) the head of the purchasing agency, after consultation with the attorney general's office, makes a written determination that award of the contract without delay is necessary to protect substantial interests of the state; or
    - (c) for a procurement unit that is not represented by the attorney general's office, the procurement unit, after consulting with the attorney for the procurement unit, makes a written determination that award of the contract without delay is necessary to protect substantial interests of the procurement unit; or
  - (3) for an appeal under Section 63G-6a-1802, or an appeal to a higher court than district court:
    - (a) the chief procurement officer, after consultation with the attorney general's office and the head of the using agency, makes a written determination that award of the contract without delay is in the best interest of the state;
    - (b) the head of the purchasing agency, after consultation with the attorney general's office, makes a written determination that award of the contract without delay is in the best interest of the state; or
    - (c) for a procurement unit that is not represented by the attorney general's office, the procurement unit, after consulting with the attorney for the procurement unit, makes a written determination that award of the contract without delay is necessary to protect the best interest of the procurement unit.
- Amended by Chapter 445, 2013 General Session

# Procurement Records

- **63G-6a-2002. Records -- Retention.**
- (1) All procurement records shall be retained and disposed of in accordance with Title 63G, Chapter 2, Government Records Access and Management Act.
- (2) Written determinations required by this chapter shall be retained in the appropriate official contract file of:
  - (a) the division;
  - (b) the procurement unit with independent procurement authority; or
  - (c) for a legislative procurement unit or a judicial procurement unit, the person designated by rule made by the applicable rulemaking authority.
- (3) A procurement unit shall keep, and make available to the public, upon request, written records of procurements for which an expenditure of \$50 or more is made, for the longer of:
  - (a) four years;
  - (b) the time otherwise required by law; or
  - (c) the time period provided by rule made by the applicable rulemaking authority.
- (4) The written record described in Subsection (3) shall include:
  - (a) the name of the provider from whom the procurement was made;
  - (b) a description of the procurement item;
  - (c) the date of the procurement; and
  - (d) the expenditure made for the procurement.



## 63G-6a-2003. Records of contracts made -- Audits -- Contract requirements.



The chief procurement officer, the procurement officer, or the head of a procurement unit with independent procurement authority shall maintain a record of all contracts made under Section 63G-6a-408, 63G-6a-802, or 63G-6a-803, in accordance with Title 63G, Chapter 2, Government Records Access and Management Act. The record shall contain each contractor's name, the amount and type of each contract, and a listing of the procurement items to which the contract relates.

# Agreements between Procurement Units

- **63G-6a-2102. Agreements between procurement units.**
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- A procurement unit may enter into an agreement with one or more other procurement units to: . . .

# Services between units

- **63G-6a-2103. Services between procurement units.**
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- (1) Upon request, a procurement unit may make services available to another procurement unit, including: . . .

# Cooperative Agreements

- **63G-6a-2105. Participation of a public entity or a procurement unit in agreements or contracts of procurement units -- Cooperative purchasing -- State cooperative contracts.**
- (1) The **chief procurement officer may**, in accordance with the requirements of this chapter, enter into a cooperative procurement, and a contract that is awarded as a result of a cooperative procurement, with:
  - (a) **another state;**
  - (b) **an external procurement unit; or**
  - (c) **a public entity in Utah or outside of Utah. . . .**

## 67-5-5. Hiring of legal counsel for agencies -- Costs.

➤ Except where specifically authorized by the Utah Constitution, or statutes, no agency shall hire legal counsel, and the attorney general alone shall have the sole right to hire legal counsel for each such agency. Where the Legislature has provided by statute for separate agency counsel, no such counsel may act as an assistant attorney general nor as a special assistant attorney general unless the attorney general shall so authorize. Unless he hires such legal counsel from outside his office, the attorney general shall remain the sole legal counsel for that agency. If outside counsel is hired for an agency, then the costs of any services to be rendered by this counsel shall be approved by the attorney general before these costs are incurred. The attorney general shall approve all billing statements from outside counsel and shall pay the full costs of this counsel unless the agency by legislative appropriation or in the form of costs, fees, fines, penalties, forfeitures or proceeds reserved or designated for the payment of legal fees receives from any other source the equivalent cost or a portion thereof, in which case the attorney general may bill the agency for the services; provided, the agency may deduct any unreimbursed costs and expenses incurred by the agency in connection with the legal service rendered.



# Rules for Outside Counsel Statute

- **67-5-32. Rulemaking authority regarding the procurement of outside counsel, expert witnesses, and other litigation support services.**
  - (1) The attorney general's office shall, on or before August 1, 2012, make rules to establish public disclosure, transparency, accountability, and reporting in relation to the procurement of outside counsel, expert witnesses, and other litigation support services.
  - (2) The rules described in Subsection (1) shall:
    - (a) ensure that a procurement for outside counsel is supported by a determination by the attorney general that the procurement is in the best interests of the state, in light of available resources of the attorney general's office;
    - (b) provide for the fair and equitable treatment of all potential providers of outside counsel, expert witnesses, and other litigation support services;
    - (c) ensure a competitive process, to the greatest extent possible, for the procurement of outside counsel, expert witnesses, and other litigation support services;
    - (d) provide for oversight and control, by the attorney general's office, in relation to outside counsel hired under a contingency fee arrangement;
    - (e) establish for transparency regarding the procurement of outside counsel, expert witnesses, and other litigation support services, subject to:
      - (i) Title 63G, Chapter 2, Government Records Access and Management Act; and
      - (ii) other applicable provisions of law and the Utah Rules of Professional Conduct;
    - (f) establish standard contractual terms for the procurement of outside counsel, expert witnesses, and other litigation support services; and
    - (g) provide for the retention of records relating to the procurement of outside counsel, expert witnesses, and other litigation support services.
- Enacted by Chapter 2, 2012 Special Session 4

# AG Procurement Rules

- **R105. Attorney General, Administration.**
- **R105-1. Attorney General's Selection of Outside Counsel, Expert Witnesses and Other Litigation Support Services.**
- **R105-1-1. Purpose and Authority.**
  - A. This purpose of this rule is to provide the requirements for procurements that are managed by the Attorney General, including the hiring of outside counsel, expert witnesses, litigation support services and procurement items.
  - B. This rule is adopted pursuant to authority granted by the Utah Procurement Code including authority to manage procurement of procurement items directly or by delegation of the Chief Procurement Officer of the Division of Purchasing of the Department of Administrative Services.

# Rule Definitions

- **R105-1-2. Definitions.**
- Terms in this Rule R105-1 shall be as defined in the Utah Procurement Code. Additional definitions are provided below.
- A. **"Agency"** means any department, division, agency, commission, board, council, committee, authority, institution, or other entity within the State government of Utah (see Utah Code Ann. Sec. 67-5-3).
- B. **"Attorney General"** means the Attorney General of the State of Utah, or the Attorney General's designee.

# Expert Witness

- D. "Expert witness" means a person whose knowledge, skill, experience, training or education in a scientific, technical or other specialized area would enable the person to give testimony under Rule 702 of the Utah Rules of Evidence.

# Litigation Support Services

- E. "Litigation Support Services" includes any goods, services, software or technology.



# Outside Counsel

- F. "Outside counsel" means an attorney or attorneys who are not, or a law firm whose attorneys are not, employed by the Attorney General's office pursuant to Utah Code Ann. Sec. 67-5-7 et seq., which the Attorney General appoints, pursuant to Utah Code Ann. Sec. 67-5-5, to represent, or provide legal advice or counsel to, an agency of the State. "Outside counsel" may or may not be designated as "Special Assistant Attorney General", as the Attorney General determines.

## R105-1-3. Special Considerations to Best Serve the Public. (public notice exception)

- 
- A. This rule applies to the procurement and appointment by of outside counsel, expert witnesses and litigation support services by the Attorney General.
- B. In order to have an effective legal strategy or to protect reputations, the procurement of outside counsel, expert witnesses and litigation support services **often requires that public notice of a particular procurement not be provided. The provisions of the Utah Procurement Code and this Rule regarding an emergency procurement must be met.**

# RFP may be used

- C. The Attorney General may select outside counsel, expert witnesses and professional litigation support services pursuant to a request for proposals under the Utah Procurement Code, rather than an Invitation for Bids, whenever the Attorney General does not make those selections through the small purchase, sole source, or emergency provisions of this rule. In any such selection process, it may be specified that the outside counsel is responsible for providing the expert witnesses or other litigation goods and services through the outside counsel's selection process and pursuant to the contract provisions with the Attorney General.

## Other processes, Code and Rules

- D. If a procurement item is not procured through the request for proposals, small, purchase, sole source or emergency provisions of this rule, the Attorney General may determine to use an Invitation for Bids or any other procurement process allowed by the Utah Procurement Code provided that the following applicable Utah laws are met:
  - 1. The Utah Procurement Code; and
  - 2. Administrative Rules of the Division of Purchasing and General Services.

# AG determine best interests based in light of resources

- E. The Attorney General's office shall ensure that the **procurement for outside counsel** is supported by a determination by the Attorney General that the procurement is in the best interests of the state, in **light of available resources** of the Attorney General's office.



# Fair treatment

- F. The Attorney General's office shall provide for the fair and equitable treatment of all potential providers of outside counsel, expert witnesses and other litigation support services.

# Initial Consideration

- **R105-1-4. Initial Determination of Whether the Procurement is a Small Purchase, Sole Source or Emergency.**
- Prior to any procurement, the Attorney General shall **first determine whether the provisions in this rule for a small purchase, sole source or emergency** procurement are applicable and if so, may use such provisions.

## R105-1-5. Use of Request for Proposal Process.

- If the procurement is not a small purchase, sole source or emergency procurement, the request for proposal process may be used when the procurement includes a factor other than price. This will often apply to professional services, such as outside counsel, expert witnesses and professional litigation support services. In any such selection process, it may be specified that the outside counsel is responsible for providing the expert witnesses or other litigation goods and services through the outside counsel's selection process and pursuant to the contract provisions with the Attorney General.

# RFP Process: In General

- **R105-1-6. Request for Proposal Process.**

- The Requests for Proposals shall be subject to the following:

- A. The requirements of the Utah Procurement Code for Requests for Proposals shall be met, **except that the emergency procurement provisions of the Utah Procurement Code and this Rule may be used to waive certain requirements as necessary.**

- B. The Request for Proposal process **may be issued in stages or may be issued after a request for information or other procurement process** allowed by the Utah Procurement Code or this Rule.

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# RFP content requirements

- C. The Request for Proposal, shall contain, at a minimum, the following information:
  - 1. A **description** of the project.
  - 2. Any **fee** arrangements.
  - 3. The persons or entities being sought in the procurement, including whether an individual person, firm or association of firms may respond.
  - 4. The **qualification criteria** and the relative importance of the criteria. Examples of criteria include:
    - a. Identification by name and experience of the proposed service provider(s);
    - b. A description of **the duties and responsibilities** of each person providing the service; and
    - c. The ability of the persons providing the service to meet the needs of the project, including the consideration of any association with other persons, expert witnesses or firms.



# More RFP content requirements

- 5. **The Contractual Requirements**, which may be accomplished by including a copy of the contract.
- 6. A **request for a conflicts analysis**, including potential conflicts of interest or other related matters concerning the offeror's ability to ethically perform the requested services.
- 7. Requirements regarding **the date, time, place, form and method concerning the filing of the Response** to the Request for Proposals.
- 8. A statement that the Attorney General **reserves the right to reject late-filed or nonconforming proposals**.
- 9. A statement that the Attorney General reserves the right to **reject all proposals**. The Attorney General also reserves the right to **modify or cancel** the Request for Proposal Process and may or may not initiate a new Request for Proposal Process for the particular procurement matter.



# RFP Notice, Award, Record

- D. **Public notice** of the Request for Proposals shall be provided in accordance with the Utah Procurement Code.
- E. The **award process**, including notice of award, shall be made by the Attorney General in accordance with the Utah Procurement Code and this Rule.
- F. **A record of the procurement shall be made in accordance with the Utah Procurement Code and this Rule, including Rule R105-1-14.**



# Small Purchases

## ➤ R105-1-7. Small Purchases.

- A. If the Attorney General determines that an anticipated procurement meets the definition of a small purchase under this Rule, the Attorney General shall make a finding in writing to that effect prior to the procurement.
- B. Upon making the finding in writing required by subsection A of this Rule, the Attorney General may proceed with the procurement in accordance with the small purchase requirements of the Utah Procurement Code.
- C. Small purchases may be by a direct award, by the use of a request for quotes or rotational system among qualified providers in accordance with policies established by the Attorney General.
- D. The procurement shall be made with as much competition as reasonably practicable while avoiding harm, or a risk of harm, to public health, safety, welfare or property.

# Small Purchase Defined

- H. "Small purchase" means a determination by the Attorney General **in writing** that the fee expected to be charged:
  - 1. **By outside counsel, expert witnesses or other professional litigation support services will be \$100,000.00 or less;**
  - 2. **A procurement item for litigation support services, will be \$50,000 or less; or**
  - 3. **Such other small purchase delegated to the Attorney General by the Chief Procurement Officer pursuant to the Utah Procurement Code.**

# Sole Source

- **R105-1-8. Sole Source.**
- A. If the **Attorney General determines in writing** after reasonable efforts to locate providers for a project, that the circumstances described for a sole source in accordance with the Utah Procurement Code exists, or if a sole source may be justified based on another provision of the Utah Procurement Code, the Attorney General may use the Sole Source procedures of the Utah Procurement Code.
- B. The Attorney General may publish notice of the sole source procurement on the internet or other means in order to learn if there is any other qualified entity or product that meets the needs of the procurement.
- C. **The Attorney General shall negotiate with the provider to ensure that the terms of the contract, including price and delivery, are in the best interest of the state.**

## R105-1-9. Emergency Procurements and Waiver of Requirements.

- A. If an emergency as defined in this Rule or the Utah Procurement Code exists, the Attorney General may authorize waiver of any provision of this Rule in order to eliminate or reduce the impact of the emergency situation.
- B. An emergency procurement, or the balance of the procurement that is not waived, shall be processed in accordance with the Utah Procurement Code and this Rule.
- C. The authorization shall be in writing, stating the emergency condition upon which the emergency procurement or waiver of the requirement is made.
- D. The procurement shall be made with as much competition as reasonably practicable while avoiding harm, or a risk of harm, to public health, safety, welfare or property.

➤

# Emergency

- C. "Emergency" means a **determination by the Attorney General in writing** that a provision of this Rule needs to be **waived** due to the need for **timeliness, litigation deadlines, confidentiality, or other emergency circumstances.**



# Emergency - from Code

- **63G-6a-803. Emergency procurement.**
- 
- (1) Notwithstanding any other provision of this chapter, a procurement officer or the procurement officer's designee may authorize an emergency procurement without using a standard procurement process when an emergency condition exists.
- (2) A procurement officer who authorizes an emergency procurement under Subsection (1) shall:
  - (a) make the authorization in writing, stating the emergency condition upon which the emergency procurement is made; and
  - (b) ensure that the procurement is made with as much competition as reasonably practicable while avoiding harm, or a risk of harm, to the public health, safety, welfare, or property.

## R105-1-10. Confidentiality.

- Except when an emergency exists under Rule R105-1-9 and in accordance with applicable law, where public inspection may be delayed until such time as the cause for the emergency no longer exists, the following shall be met:
  - A. Receipt, Opening, and Recording of Bids.
    - 1. Receipt. Upon receipt, all bids and modifications will be time stamped, but not opened. Bids submitted through electronic means shall be received in such a manner that the time and date of submittal, along with the contents of such bids shall be securely stored until the time and date set for bid opening. They shall be stored in a secure place until bid opening time.

## Bid opening (except for emergencies)

- 2. Opening and Recording. **Bids and modifications shall be opened publicly**, in the presence of one or more witnesses, at the time and place designated in the Invitation for Bids. The names of the bidders, the bid price, and other information as is deemed appropriate by the procurement officer, shall be read aloud or otherwise be made available. The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in subsection 3 of this section. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the non-confidential portion of the bid. Make and model, and model or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary. Bids submitted through electronic means shall be received in such a manner that the requirements of this section can be readily met.

# Confidential Data

- 3. Confidential Data. The Attorney General shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Attorney General shall inform the bidders in writing what portions of the bids will be disclosed.

# Protected Records

- B. Protected Records. The following are protected . . . as allowed by the Governmental Records Access and Management Act (GRAMA) Title 63G, Chapter 2 of the Utah Code. The protections below apply to the various procurement records including records submitted by offerors and their subcontractors or consultants at any tier.
- 1. **Trade Secrets.** Trade Secrets, as defined in Utah Code Ann. Section 13-24-2, will be protected and not be subject to public disclosure if the procedures of subsection C of this Rule are met.
- 2. **Certain commercial information or non-individual financial information.** Commercial information or non-individual financial information subject to the provisions of Utah Code Ann. Section 63G-2-305(2) will be a protected record and not be subject to public disclosure if the procedures of subsection C of this Rule are met.
- 3. **Other Protected Records under GRAMA.** There will be no public disclosure of other submitted records that are subject to non-disclosure or being a protected record under a GRAMA statute provided that the requirements of subsection C of this Rule are met unless GRAMA requires such nondisclosure without any preconditions.

# Process for Requesting Non-Disclosure

- C. Process for Requesting Non-Disclosure. Any person (firm) who believes that a record should be protected under subsection B of this Rule shall include with their proposal or submitted document:
  - 1. A written indication of which provisions of the submittal(s) are claimed to be considered for business confidentiality (including trade secret or other reason for non-disclosure under GRAMA; and
  - 2. A concise statement of reasons supporting each claimed provision of business confidentiality.
- D. Notification.
- The person who complies with subsection C of this Rule shall be notified by the governmental entity prior to the public release of any information for which business confidentiality has been asserted.



# Disclosure Cont'd.

- E. Non-Disclosure and Dispute Process. Except as provided by court order, the governmental entity to whom the request for a record is made under GRAMA, may not disclose a record claimed to be protected under subsection B of this Rule but which the governmental entity or State Records Committee determines should be disclosed **until the period in which to bring an appeal expires or the end of the appeals process, including judicial appeal**. This subsection E does not apply where the claimant, after notice, has waived the claim by not appealing or intervening before the records committee. To the extent provided by law, the parties to a dispute regarding the release of a record may agree in writing to an alternative dispute resolution process.
- F. Timing of Public Disclosure. **Any allowed public disclosure of records submitted in the request for proposal process will only be made after the selection of the successful offeror(s) has been made public.**

# G. Publicizing Awards.

- 1. After the selection of the successful offeror(s), notice of award shall be available in the purchasing agency's office and may be available on the internet.
- 2. The following shall be disclosed to the public after notice of the selection of the successful offeror(s) and after receipt of a GRAMA request and payment of any lawfully enacted and applicable fees:
  - a. The contract(s) entered into as a result of the selection and the successful proposal(s), except for those portions that are to be non-disclosed under R33-3-204;
  - b. The unsuccessful proposals, except for those portions that are to be non-disclosed under R33-3- 204;
  - c. The rankings of the proposals;
  - d. The names of the members of any selection committee (reviewing authority);
  - e. The final scores used by the selection committee to make the selection, except that the names of the individual scorers shall not be associated with their individual scores or rankings; and
  - f. The written justification statement supporting the selection, except for those portions that are to be non-disclosed under this Rule.

# Matters not disclosed

- 3. After due consideration and public input, the following has been determined by the Attorney General to impair governmental procurement proceedings or give an unfair advantage to any person proposing to enter into a contract or agreement with the Attorney General, and will not be disclosed by the Attorney General at any time to the public including under any GRAMA request:
  - a. The names of individual scorers in relation to their individual scores or rankings;
  - b. Non-public financial statements; and
  - c. Past performance and reference information, which is not provided by the offeror and which is obtained as a result of the efforts of the Attorney General. To the extent such past performance or reference information is included in the written justification statement, it is subject to public disclosure.

## R105-1-11. Special Provisions regarding Contingency Fee contracts for Outside Counsel.

- A. The Attorney General shall not enter into a contingency fee contract for outside litigation or anticipated litigation counsel services unless the following requirements are met throughout the contract period and extensions thereof:
  - 1. The Attorney General shall retain complete oversight and control over the course and conduct of the litigation or anticipated litigation;
  - 2. The Attorney General shall appoint a member of the Utah Attorney General's Office to personally oversee the litigation;
  - 3. The Utah Attorney General shall retain veto power over any decisions made by outside counsel;
  - 4. The Utah Attorney General shall be apprised, attend and/or participate in all settlement conferences; and
  - 5. Decisions regarding settlement of the case shall be made by the Utah Attorney General and not the outside counsel.
- B. This Rule R105-1-11 does not apply to the hiring of outside bond counsel.

## R105-1-12. Transparency in Contingency Fee Contracts with Outside Counsel.

- A. Except as otherwise provided by GRAMA, applicable law, Rules of Professional Conduct or this Rule, a copy of the executed contingency fee contract shall be made available for public inspection in accordance with GRAMA.
- B. Any payment by the Attorney General under a contingency fee contract shall be made available for public inspection in accordance with GRAMA.
- C. Upon request of the President of the Utah Senate or Speaker of the Utah House of Representatives, the Utah Attorney General shall make available all contracts for hiring outside counsel on a contingency fee basis in the preceding year from the date of the request as well as any known names of the parties to the legal matter, the amount of any recovery and the amount of any contingency fee paid. Notwithstanding this, the Attorney General may withhold information that is confidential under GRAMA, Rules of Professional Conduct or applicable law unless the Attorney General determines that such release of information to the President of the Utah Senate or Speaker of the Utah House of Representatives can be adequately assured of confidentiality through a confidential agreement or similar document.

# AG Contract Terms

- **R105-1-13. Contracts.**

- Those awarded a contract under this Rule shall be required to enter into a written contract with the Attorney General. The written contract shall contain all material terms set forth in:
  - A. The final procurement documents issued by the Utah Attorney General;
  - B. The provisions in documents submitted by the provider to the extent such provisions are accepted by the Attorney General;
  - C. A termination for cause and a termination for convenience clause; and
  - D. Any terms required by law, whether by the constitutions, statutes, or rules or regulations of the United States or the State of Utah.

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# Some General Contract Principles

- The following slides are some general contract principles.

# Two basic principles

- 1. Two birds example. (If you tie two birds together, even though they have four wings, they cannot fly.) (They do not contract with each other.)
- 2. String is too tight example. (If the string is too tight it snaps, if too loose, it does not play.)

Offer, Acceptance, Consideration ---  
*U.S. General, Inc., v. Kenneth Jenson and Julie Jenson*, 128 P.3d 56 (Utah App. 2005)

- P13 Generally, "an executed earnest money receipt and offer to purchase agreement is a contract binding on both parties." *Cahoon v. Cahoon*, 641 P.2d 140, 143 (Utah 1982). In contrast, an option is "a unilateral obligation binding only on the optionor." *Id.* "An option contract is a continuing offer, supported by consideration, which the promisor is bound to keep open." *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 859 (Utah 1998). "It is unique; the holder has 'the legal power to consummate a second contract . . . and at the same time the legal privilege of not exercising it.'" *Id.* (alteration in original) (quoting *Property Assistance Corp. v. Roberts*, 768 P.2d 976, 978 (Utah Ct. App. 1989)) (additional citation omitted). **"An option consists of the following two elements: '(1) an offer to sell, which does not become a contract until accepted; and (2) a contract to leave the offer open for a specified time.'" *Id.* (quoting *Property Assistance Corp.*, 768 P.2d at 978 ).** "Thus, by its terms, an option contract for real property requires one offer and acceptance of the exclusive right to purchase the property and another offer and acceptance for the actual transfer of the property." *Property Assistance Corp.*, 768 P.2d at 978 .
- {128 P.3d 60} P14 **"The contract to leave the option open for a specified time must be supported by consideration; without it the promisor is not bound."** *Coulter & Smith*, 966 P.2d at 859 . **"Consideration is an act or promise, bargained for and given in exchange for a promise."** *Id.* (quoting *Copper State Leasing Co. v. Blacker Appliance & Furniture Co.*, 770 P.2d 88, 91 (Utah 1988)) (additional quotations and citation omitted). "Consideration sufficient to support the garden variety contract will likewise support an option." *Id.* (quotations and citation omitted). . . .
- P29 In sum, the Contract was an option contract, with a provision for renewal, which Plaintiff was bound to keep open until May 1, 2002. By paying the Deposit, 1999 property taxes, HOA fees, and a bond fee, Defendants paid the consideration to keep the option open until January 31, 2000; . . .

Offer, Acceptance, Consideration Case:  
*Traco Steel Erectors, Inc. v. Control, Inc. et al.*, 175 P.3d 572 (Utah  
App. 2007)

- Moreover, Traco argues that there was no consideration given to Traco for reducing the contract balance and entering into an accord and satisfaction. **"Generally the elements of a contract must be present in an accord and satisfaction, including proper subject matter, offer and acceptance, competent parties, and consideration."** *Neiderhauser Builders & Dev. Corp. v. Campbell*, 824 P.2d 1193, 1197-98 (Utah Ct. App. 1992) (internal quotation marks omitted).



Offer – Acceptance – Consideration Case –  
*Terry v. Retirement Board, Public Employees' Health Program*, 157  
P.3d 362 (Utah App. 2007)

- **“To establish a breach of contract claim, a complainant must first show that a contract exists. See *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, P14, 20 P.3d 388. The Utah Supreme Court has held that in a dispute over the existence of an insurance contract, **offer, acceptance, and consideration** are shown by the submission of an application by the applicant, approval by the insurance company, and the subsequent payment of premiums.”**

# Interpretation Rules

- Contract Interpretations:
- Plain Meaning – according to common meaning.
- Contextual Interpretation – courts not want to substitute court's meaning for intent of parties.
- Influenced by Professor Corbin – determine meaning in light of context of all of the surrounding circumstances. (note parole evidence rule – not allow contradictory prior evidence – but this allows for NON-CONTRADICTORY prior evidence.)
- Maybe an ambiguity needs to be resolved. Note – ambiguities usually construed against drafter.
- Construe language consistently where possible
- Ambiguity construed against drafter.



# Interpretation Rules Cont'd

- Expressio Unius Est Exclusio Alterius – The expression of One excludes the Others.
- Caution – state that list is not exhaustive to get around this – just illustrative.
- Ejusdem Generis – Of the same kind or class.
- Difficulty – how narrow or broad to construe class of items.
- Specific over General.
- Negotiated over Boilerplate terms.
- Consistent with Public Interest.
- Technical terms may override plain meaning.
- Customary practices.

Construe to be legal, when possible  
*OCKEY v. LEHMER et al.*, 189 P.3d 51 (Utah 2008)

- [10] ¶ 24 Comparing Ockey's case to these two cases demonstrates that the 1994 conveyance was merely voidable. First, no statute declares ultra vires acts by trustees absolutely void as against public policy. Second, the trustees' actions only affected Ockey—they did not harm the general public. **Finally, in light of the freedom to contract, we have a duty to employ “any reasonable construction” to declare contracts “lawful and not in contravention of public welfare.”** FN21

**AMBIGUITY CONSTRUED AGAINST DRAFTER –**  
*MAAK v. IHC HEALTH SERVICES, INC.*, 166 P. 3d 631  
(Utah App. 2007)

- “[U]nless the language of an insurance **contract** is ambiguous or unclear, the court must construe it according to its plain and ordinary meaning.” *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 836 (Utah 1998). **“A contract is ambiguous if it is unclear, omits terms, has multiple meanings, or is not plain to a person of ordinary intelligence and understanding. Ambiguities are construed against the drafter-the insurance company.”** *Utah Farm Bureau Ins. Co. v. Crook*, 1999 UT 47, ¶ 6, 980 P.2d 685 (citations omitted).
- (My note – exception – option contracts where benefit is for person holding option.)



# CONTRACT INTERPRETATIONS – UTAH CASE

*Swenson v. Erickson*, 131 P.3d 267 (Utah App. 2006)

## PLAIN MEANING USED UNLESS CLEARLY TECHNICAL

- [7] ¶ 11 Thus, as with the interpretation of contracts generally, we “first look[ ] to the **contract's four corners to determine the parties' intentions, which are controlling.**” *Fairbourn Commercial, Inc. v. American Hous. Partners, Inc.*, 2004 UT 54, ¶ 10, 94 P.3d 292 (quotations and citations omitted). If that language is unambiguous, we will determine “the parties' intentions from the **plain meaning** of the contractual language as a matter of law.” *Id.* (quotations and citations omitted); see also *Cooley v. Call*, 61 Utah 203, 211 P. 977, 980-81 (1922) (“[O]ur decision of this case is based entirely upon what we conceive to be the obvious intention of the parties at the time they executed the contract. **We have endeavored to determine that intention from the plain, unambiguous terms of the contract considered in the light of what the parties must have foreseen and contemplated at the time the contract was executed....** [W]e deem it our duty to give effect to that intention without regard to technical rules, the too rigid application of which oftentimes defeats the very purpose for which they were intended.”); *Cummings v. Nielson*, 42 Utah 157, 129 P. 619, 621-22 (1912) (stating that courts must give “the language found in [an] agreement its ordinary and usual meaning when applied to the subject-matter and nature of the agreement and apparent object or purpose of the parties” and that “[c]ourts will always incline towards giving language a reasonable construction, and will avoid, if possible, an absurdity if the language is susceptible of some other meaning”); *Daly v. Old*, 35 Utah 74, 99 P. 460, 463 (1909) (“The only thing ... that the courts are concerned with is to ascertain the intention of the parties to any **contract**, and, when this is ascertained, the duty to enforce such intention admits of no escape. A primary canon of construction is to construe\*271 **the language of the parties when applied to the subject-matter of the contract. The language used when applied to the subject-matter must be given its usual and ordinary meaning, unless it is clear that certain words or terms are employed in a technical sense.**”).

## UTAH GOOD FAITH AND FAIR DEALING CASE –

OMAN v. DAVIS SCHOOL DISTRICT et al., 194 P.3d 956 (Utah 2008)

- [19][20][21] ¶ 47 “An implied covenant of good faith and fair dealing inheres in every contract. Under the covenant of good faith and fair dealing, both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract.” Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 14, 94 P.3d 193 (citations omitted).
- The good faith performance doctrine may be said to permit the exercise of discretion for any purpose-including ordinary business purposes-reasonably within the contemplation of the parties. A contract thus would be breached by a failure to perform in good faith if a party uses its discretion for a reason outside the contemplated range-a reason beyond the risks assumed by the party claiming the breach.
- Markham v. Bradley, 2007 UT App 379, ¶ 34, 173 P.3d 865 (emphasis omitted) (internal quotation marks omitted).



## IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CASE: *Oakwood Village LLC v. Albertsons, Inc. et al.*, 104 P.3d 1226 (Utah 2004)

- **P45 While a covenant of good faith and fair dealing inheres in almost every contract,** some general principles limit the scope of the covenant, as defendants correctly note. **First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante.** *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991). **Second, this covenant cannot create rights and duties inconsistent with express contractual terms.** See *id.*; *Rio Algom Corp. v. Jimco, Ltd.*, 618 P.2d 497, 505 (Utah 1980). **Third, this covenant cannot compel a contractual party to exercise a contractual right "to its own detriment for the purpose of benefitting another party to the contract."** *Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs.*, 889 P.2d 445, 457 n.13 (Utah 1994). **Finally, we will not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract.** See *Dalton v. Jerico Constr. Co.*, 642 P.2d 748, 750 (Utah 1982).
- P46 Oakwood misreads the scope of the covenant of good faith and fair dealing in asking this court to infer a promise of continuous operation not supported by the language of the relevant contracts and, in fact, contradicting express provisions in them. . . .
- P50 Similar to *St. Benedict's*, *Olympus Hills* involved a lease between a developer and a Smith's grocery store, which contained an express covenant of continuous operation that obliged Smith's to continuously operate "any lawful retail selling business." 889 P.2d at 451. Rather than defaulting on the lease, Smith's opened a warehouse box store in order to restrict competition with another grocery store it operated close to the Olympus Hills Shopping Center. *Id.* at 448. Olympus Hills thereafter sued Smith's, claiming that Smith's had violated the covenant of good faith and fair dealing. *Id.* On appeal, the *Olympus Hills* court concluded that the jury had properly found that the circumstances and purpose of Smith's temporary closure had been inconsistent with the parties' justified expectations of continuous operation and was, in effect, a breach of its contractual rights. *Id.* at 450.
- P51 We disagree with Oakwood that the decision in *Olympus Hills* supports its claim. Smith's operation of a warehouse box store was deemed a breach of contract because the lease contained an express covenant of continuous operation and a restriction on the nature of operations. **Here, Albertsons lease contains neither a restrictive use nor a continuous operation provision and further grants Albertsons an unqualified right to sublet or assign its lease.**



*Snow v. Chartway Federal Credit Union*, 306 P.3d 868 (Utah App. 2013)

- Snow first argues that the district court erred in dismissing his claim for breach of the **implied covenant of good faith** and fair dealing. Specifically, Snow claims that Chartway promised him that if he found a buyer who was willing to meet certain requirements, Chartway would allow that buyer to assume the loan. Snow argues that he relied on Chartway's promise, that he found a prospective buyer who was prepared to close on Chartway's terms, and that Chartway ultimately failed to accept that offer. **“As a general rule, every contract is subject to an implied covenant of good faith.”** *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998) (citation and internal quotation marks omitted). **“‘Under [the covenant], both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract.’”** *Markham v. Bradley*, 2007 UT App 379, ¶ 18, 173 P.3d 865(alteration in original) (quoting *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 14, 94 P.3d 193). **“No such covenant may be invoked, however, if it would create obligations inconsistent with express contractual terms.”** *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 10, 266 P.3d 814.

# Know what you want

The first obvious step is to know what you want to achieve. Any changes will likely cost more at a later time.

e.g. Park access road change order

The background of the slide is a solid blue color. In the bottom right corner, there are several concentric white circles that resemble ripples on water, creating a decorative effect.

# How is it going to be Procured?

- What is the “who” factor?
- There are some contracts that cannot save you from totally corrupt contractors. (examples.)
- The more discretionary or complex the tasks, the more the “who factor” matters. Though there are exceptions to this.

## Utah case – responsive and responsible

- In *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995), in regard to the issue of responsiveness and acceptance of the response, the Utah Supreme Court states that:
- An acceptance must unconditionally assent to all material terms presented in the offer, including price and method of performance, or it is a rejection of the offer. *Williams v. Espey*, 11 Utah 2d 317, 322, 358 P.2d 903, 906 (1961); *R.J. Daum Constr. Co. v. Child*, 122 Utah 194, 200, 247 P.2d 817, 819 (1952); see 17 C.J.S. Contracts § 43 (1963) (stating that price and method of performance are two material terms of an offer). Also, the burden of proof for showing the parties' mutual assent as to all material terms and conditions is on the party claiming that there is a contract. *B & R Supply Co. v. Bringham*, 28 Utah 2d 442, 444, 503 P.2d 1216, 1217 (1972). In regard to “responsibility” the Court at 1375 also states that:



# *Even in low bid “responsibility” and “responsiveness” applies*

- *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372 (Utah 1995)
- In deciding which bid to accept, the city may consider a variety of factors other than the amount of the bid, including the experience, skill, ability, and honesty of the bidders. *Schulte v. Salt Lake City*, 79 Utah 292, 300, 10 P.2d 625, 628 (1932). Thus, a municipality is not bound to accept a bid simply because it is the lowest. This is true even when the advertisement indicates that the municipality will contract with the lowest bidder. *Thatcher Chem. Co. v. Salt Lake City Corp.*, 21 Utah 2d 355, 358, 445 P.2d 769, 771 (1968). Because the local decision makers are in the best position to decide which bid is best for the municipality, courts will not interfere with their judgment unless fraud, dishonesty, collusion, or lack of good faith is involved. *Clayton v. Salt Lake City*, 15 Utah 2d 57, 59, 387 P.2d 93, 94 (1963); *Schulte*, 10 P.2d at 628.

- [My note: Therefore, the bidder must be responsive to the specifications for the bid and must be a responsible bidder. These two qualifications, when used properly, can provide protection to the Owner in the bidding process. For instance, a creative Owner can place special requirements in the bidding documents. These can include a certain number of years experience on a particular type of work, special licensing requirements and the like. These special terms build “qualifications” into the competitive sealed bidding process.]

## Cases on RFPs or “Best Value”

- ***Portfolio Disp. Management Group LLC v. U.S.*, 64 Fed. Cl. 1 (2005)**
- The U.S. Court of Federal Claims used an arbitrary and capricious standard to review whether a technical evaluation panel had properly evaluated an Offeror. The procurement in question was a “best-value” procurement with specific criteria, including the management plan and past performance.



- The Court stated that:
- We accord the agency deference, only setting aside an action or decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Fru-Con Constr. Co., Inc. v. United States, 57 Fed.Cl. 483, 485 (2003). This analysis considers whether: "(1) there was subjective bad faith on the part of procurement officials; (2) there was a reasonable basis for the procurement decision; (3) the procuring officials abused their discretion; and (4) pertinent statutes or regulations were violated." Metric Sys. Corp. v. United States, 42 Fed.Cl. 306, 310 (1998) (citing Keco Indus., Inc. v. United States, 203 Ct.Cl. 566, 492 F.2d 1200, 1203-04 (1974)). . . .
- In alleging error, the Plaintiff must do more than identify circumstances where the procuring agency made a mistake; it must establish that such a mistake was so excessive as to fall outside the decision-maker's ambit of discretion. In other words, Plaintiff must persuade us "that there was no rational basis for the agency's determinations." *Id.* at 1351 (quoting Impresa Costruzioni v. United States, 238 F.3d 1324, 1332-33 (Fed.Cir.2001)); see also Baird Corp. v. United States, 1 Cl.Ct. 662, 664 (1983). In this particular case, the burden is especially high because we are asked to overturn an award in a "best-value" procurement. 48 C.F.R. § 15.605(c) (2005) ("Federal Acquisition Regulation," or "FAR"); TRW, Inc. v. Unisys Corp., 98 F.3d 1325, 1327-28 (Fed.Cir.1996); accord, E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed.Cir.1996).

*Conscoop-Consorzia FRA Cooperative DI Prod. E.  
Lavoro v. U.S.*, 62 Fed. Cl. 219, 224, 227, 228 (2004)

- In a negotiated procurement, contracting officers are generally afforded even greater decision making discretion, in comparison to their role in sealed bid procurements. "It is well-established that contracting officials are accorded broad discretion in conducting a negotiated procurement ...." *Hayes Int'l Corp. v. United States*, 7 Cl.Ct. 681, 686 (1985) . . .



- "[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it." Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed.Cir.1996).  
Moreover, when a bidder alleges bad faith, "[i]n order to overcome the presumption of good faith [on behalf of the government], the proof must be almost irrefragable." Info. Tech. Applications Corp. v. United States, 316 F.3d 1312, 1323 n. 2 (Fed.Cir.2003). "Almost irrefragable proof" amounts to "clear and convincing evidence." Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239-40 (Fed.Cir.2002). "In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some specific intent to injure the plaintiff." Torncello v. United States, 231 Ct.Cl. 20, 681 F.2d 756, 770 (1982). . . .  
As to the evaluators' changed score sheets, the Court of Federal Claims stated:  
The evaluator score sheets were works in progress. The lack of explicit evaluator documentation of changes by itself does not support a finding of bias. Moreover, without strong evidence to the contrary, unexplained changes to the score sheets are assumed to be properly within the scope of the evaluation.  
Galen Med., 56 Fed.Cl. at 109. As Galen has presented no evidence to the contrary, we conclude the court's finding that the score sheets were works in progress was not clearly erroneous. Evaluators need **\*1334** not document every clerical step taken during filling out score sheets as part of the bid evaluation process. Additionally, the record shows many of Galen's scores were explained on the face of the score sheets.
- [NOTE: Always have a written justification statement adopted by the selection committee.]

# Performance Evaluations

- 1. In the long-run, the RFP process only works if we are willing to honestly evaluate contractors and use those evaluations in future processes.
- 2. Have debriefing, if needed.
- 3. Owner's evaluations have more weight.

# Utah Constitution Debt Limitation



## ➤ **ARTICLE XIV PUBLIC DEBT**

### **Section 1. [Fixing the limit of the state indebtedness - Exceptions.]**

To meet casual deficits or failures in revenue, and for necessary expenditures for public purposes, including the erection of public buildings, and for the payment of all Territorial indebtedness assumed by the State, the **State may contract debts, not exceeding in the aggregate at any one time, an amount equal to one and one-half per centum of the value of the taxable property of the State**, as shown by the last assessment for State purposes, previous to the incurring of such indebtedness. But the State shall never contract any indebtedness, except as provided in Article XIV, Section 2, in excess of such amount, and all monies arising from loans herein authorized, shall be applied solely to the purposes for which they were obtained.

➤ **History: Const. 1896; L. 1909, S.J.R. 8; 1996, S.J.R. 6, 4.**

# Division of Finance Approval

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- **63A-3-203. Accounting control over state departments and agencies -- Prescription and approval of financial forms, accounting systems, and fees.**
- (1) The director of the Division of Finance shall:
- (a) exercise accounting control over all state departments and agencies except institutions of higher education; and
- (b) prescribe the manner and method of certifying that funds are available and adequate to meet all contracts and obligations. . . .
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